

STATE OF NORTH CAROLINA  
COUNTY OF YADKIN

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09-CVS-355

TRIAD GROUP, INC., OCEAN TRAIL  
CONVALESCENT CENTER, INC.,  
LOUISBURG NURSING CENTER, INC.,  
ROXBORO NURSING CENTER, INC.,  
YADKIN NURSING CARE CENTER, INC.,  
NOLAN G. BROWN, and SUE J. BROWN,

Plaintiffs,

v.

WACHOVIA BANK, N.A., f/k/a First Union  
National Bank,

Defendant.

**ORDER ON MOTION TO DISMISS**

THIS MATTER is before the Court on Defendant Wachovia Bank, N.A.'s Motion to Dismiss ("Defendant's Motion"). After reviewing the submissions by counsel and hearing oral arguments, the Court hereby GRANTS IN PART and DENIES IN PART Defendant's Motion.

Defendant moves to dismiss Plaintiffs' claim for punitive damages based on the Letter of Credit and Reimbursement Agreement ("LOC Agreement"). Specifically, Defendant points to section 9.18(c) of the LOC Agreement which provides:

The Borrowers and the Bank agree that they shall not have a remedy of punitive or exemplary damages against the other in any Dispute and hereby waive any right or claim to punitive or exemplary damages they have now or which may arise in the future in connection with any Dispute whether the Dispute is resolved by arbitration or judicially.

(Def.'s Mem. Supp. Mot. Dismiss, Ex. B.) According to the LOC Agreement, the term "Dispute" includes "claims arising from documents executed in the future" and "claims arising out of or connected with the transaction contemplated by this Agreement." (Def.'s Mem. Supp. Mot. Dismiss, Ex. B.) Plaintiffs' claims arise out of the LOC Agreement and other related credit documents. Therefore, Plaintiffs have waived any claim against Defendant for punitive damages.

Defendant also moves to dismiss Count Five of Plaintiffs' First Amended Complaint. It contends that Plaintiffs' allegations fall outside the scope of the North Carolina's Unfair and

Deceptive Trade Practices Act (“UDTPA”). The Court agrees. The securities transaction exception “excludes more than just conventional securities.” *Charlotte-Mecklenburg Hosp. Auth. v. Wachovia Bank, N.A.*, No. 08-CVS-27739, ¶ 21 (N.C. Super. Ct. Oct. 6, 2009). It also excludes transactions entered into for the purpose of raising capital. *Oberlin Capital, LP v. Slavin*, 147 N.C. App. 52, 62, 554 S.E.2d 840, 848 (2001) (affirming the dismissal of a UDTPA claim when the transaction was a loan agreement); *Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc.*, 2007 NCBC 17 ¶¶ 45–46 (N.C. Super. Ct. June 8, 2007), <http://www.ncbusinesscourt.net/opinions/2007%20NCBC%2017.pdf> (dismissing a UDTPA claim when the transaction at issue had a capital raising purpose even though the defendant’s “normal business activities included arranging business financing”).

The transactions at issue here were part of a financing arrangement to fund the operation and construction of Plaintiffs’ healthcare centers. (See Am. Compl. at 2–6.) Given the “capital raising” nature of this arrangement, Count Five is hereby dismissed. Although Defendant may enter into swap agreements and other financing arrangements on a day-to-day basis, nothing in the Amended Complaint suggests that such transactions constitute part of Plaintiffs’ day-to-day activities. Because Plaintiffs failed to satisfy the “in or affecting commerce” element, the Court need not decide whether the sophistication and relationship of the parties also warrant dismissal. See *Carcano v. JBSS, LLC*, 2009 N.C. App. LEXIS 1612, \*22 (Oct. 6, 2009) (finding that there was no inequitable assertion of power or position when the transactions at issue were “capital raising ventures among sophisticated business entrepreneurs”).

Plaintiffs have alleged facts sufficient for the remainder of their claims to go forward. In addition, the Court recognizes that certain obligations may be subject to equitable principles of general application. Section 3(a)(v) of the ISDA Master Agreement provides:

Each party represents to the other party that . . . [i]ts obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms . . . *subject, as to enforceability, to equitable principles of general application* (regardless of whether enforcement is sought in a proceeding in equity or at law).

(Def.’s Mem. Supp. Mot. Dismiss, Ex. D (emphasis added).) The Court need not address the question of whether Plaintiffs are entitled to some form of equitable relief at this time. The Court simply holds that equitable relief *may* be available.

Based on the foregoing, the Court hereby ORDERS the following:

1. Defendant's Motion is GRANTED as to Count Five and any claims for punitive damages.
2. Defendant's Motion is DENIED as to the remaining claims.

This the 12th day of April, 2010.

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