

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of )	)	
Interstate Gas Supply, Inc. d/b/a IGS )	)	
Energy, )	)	
Complainant, )	)	
v. )	)	Case No. 19-362-GE-CSS
Santanna Natural Gas Corporation d/b/a )	)	
Santanna Energy Services, )	)	
Respondent. )	)	

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**MOTION TO DISMISS BY  
SANTANNA NATURAL GAS CORPORATION**

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Pursuant to R.C. 4905.26 and Ohio Adm. Code 4901-9-01(C), and 4901-1-12, Santanna Natural Gas Corporation d/b/a Santanna Energy Services (Santanna) moves the Public Utilities Commission of Ohio (Commission) to dismiss, with prejudice, the frivolous and baseless Complaint filed by Interstate Gas Supply, Inc. (IGS) against Santanna on February 1, 2019 for failure to state reasonable grounds for a complaint. As demonstrated more fully in the memorandum in support, IGS failed to state claims upon which relief can be granted, IGS failed to assert factual allegations that sustain its claims, and IGS failed to produce any evidence to substantiate its claims. Ohio Adm. Code 4901-9-01(C)(3); 4901-9-01(B). The Commission is also unable to provide the requested relief under Ohio law. See Ohio Adm. Code 4901-9-01(C)(1); *Penn Cent. Transp. Co. v. Public Utilities Comm.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589, 1973 Ohio LEXIS 316, \*3. Simply put, IGS's Complaint is nothing more than an attempt to eliminate its competition

in the competitive market. Accordingly, IGS's Complaint against Santanna should be dismissed with prejudice. Alternatively, Santanna moves the Commission to dismiss IGS's third and fourth requests for relief as IGS is seeking relief that the Commission is not able to provide under Ohio law. Id.

For the foregoing reasons and as further explained in the memorandum in support of the Motion to Dismiss attached hereto, Santanna respectfully requests that the Commission dismiss IGS's Complaint, with prejudice, in its entirety.

Respectfully submitted,



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**I. INTRODUCTION**

In an attempt to eliminate another competitor from the Ohio market, IGS filed a cookie-cutter complaint that is strikingly similar to a previous complaint that IGS filed against another competitor, alleging identical claims of misconduct.<sup>1</sup> Interestingly, all paragraphs of the complaints are nearly identical except for the addition of the Fifth Claim. In the identical complaint filed in 2017, IGS was able to extract a settlement from the supplier that in essence prevents the supplier from operating in the state of Ohio for a period of two years.<sup>2</sup> In an unusual filing that claims it addresses alleged “misconduct by door-to-door sales agents used by third party vendors to solicit sales,” the parties’ joint motion to dismiss sets forth portions of a settlement regarding an agreement to suspend all

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<sup>1</sup> Cf. Complaint (February 1, 2019), with *IGS v. Titan Gas*, 17-2452-GE-CSS, Complaint (December 1, 2017).

<sup>2</sup> *IGS v. Titan Gas*, 17-2452-GE-CSS, Joint Motion to Dismiss (December 21, 2018).

residential sales channels in Ohio.<sup>3</sup> Two months after being able to extract such an unusual public settlement and successfully eliminate a competitor in the residential market, IGS decided to attempt to eliminate another competitor by alleging identical claims of misconduct that purportedly occurred over 13 months ago. Unlike the prior complaint where IGS filed its grievance within four months, IGS did not file its Complaint (or even contact Santanna to inform them of the alleged misconduct) until 13 months after the alleged incident occurred. The generic Complaint filed by IGS does not set forth specific facts with regard to the alleged incident by Santanna and does not even state whether the allegations or purported unlawful practices concern competitive electric or natural gas services.

IGS failed to support its Complaint with factual allegations that sustain its claims as required by Ohio Adm. Code 4901-9-01(B). IGS frames its factual allegations contained in the “Background” section of its Complaint to create some sense of impropriety, but it does not allege crucial facts that would be necessary to support its five claims or its claims for relief and does not provide evidence connecting Santanna to the alleged improper practices that form the central basis for the entire Complaint. Absent these factual allegations against Santanna, IGS failed to state a claim upon which relief can be granted. IGS also failed to demonstrate how any service rendered by Santanna is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law as required by R.C. 4905.26. Moreover, IGS requests that the Commission provide relief that the Commission is statutorily and legally unable to afford IGS. Specifically, the Commission is unable to award treble damages against Santanna for the actions and

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<sup>3</sup> Id. at 1.

violations alleged in the Complaint. Additionally, the Commission is unable to grant injunctive relief.

For all of these reasons, reasonable grounds for a complaint have not been stated. Therefore, Santanna moves to dismiss all five claims brought by IGS in its Complaint because IGS has failed to support its claims with adequate factual allegations, as required by the Commission's rules, Ohio law, and precedent.

Additionally, IGS should be barred from making cookie-cutter, baseless complaints, without any facts or evidence to substantiate its claims, against its competitors in an attempt to harm the reputations of its competitors, to thwart competitors' sales efforts in the market, and/or to eliminate the competitors from the market. IGS's frivolous actions in asserting this Complaint against Santanna are sanctionable. Accordingly, the Commission should bar IGS from filing frivolous complaints and should issue sanctions against IGS for filing this baseless Complaint against Santanna.

## **II. STANDARD OF REVIEW**

In considering this motion, the Commission must distinguish between factual allegations and unsupported legal conclusions. This is an important distinction as, at this stage of the case, factual allegations are accepted as true, but unsupported legal conclusions are not. The Supreme Court of Ohio has determined that "[u]nsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss."<sup>4</sup> While the Commission is bound to accept factual allegations (not conclusions) as true and construe them in favor of the complaining party for purposes of considering a

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<sup>4</sup> See, e.g., *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989) (internal citations omitted).

motion to dismiss,<sup>5</sup> the Commission must also be able to determine that sufficient factual allegations contained in the four corners of the Complaint exist in order to constitute the elements of the claims asserted by IGS.<sup>6</sup> Thus, the Commission's ruling on this motion to dismiss turns on the question of whether IGS has made factual allegations that support its legal conclusions. As demonstrated below, IGS has not done so. As such, the Complaint should be dismissed with prejudice.

### **III. ARGUMENT**

#### **A. IGS Has Not Provided Evidence Linking Santanna to the Alleged Events at Issue in the Complaint.**

R.C. 4905.26 requires a complainant to state reasonable grounds for a complaint before a case may be set for hearing by the Commission.<sup>7</sup> In determining whether reasonable grounds for a complaint exist, the Commission has considered whether the complainant has alleged facts sufficient to support the claim and has not allowed complainants to rely on the discovery process to obtain information necessary to allege facts in support of the complaint.<sup>8</sup> In short, in order for a complaint to go forward, it “must stand on its own.”<sup>9</sup>

IGS's entire Complaint appears to be based on the allegations contained in the “Background” section of the Complaint.<sup>10</sup> This section contains nine generic statements or allegations, and IGS does not offer substantive evidence to support any of the statements

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<sup>5</sup> See *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1989) (internal citations omitted).

<sup>6</sup> See *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 19, 688 N.E.2d 506 (1998).

<sup>7</sup> See, e.g., *Ohio Utilities Co. v. Pub. Util. Comm'n*, 58 Ohio St.2d 153, 159 (1979).

<sup>8</sup> See *In the Matter of the Complaint of Diana Williams v. Ohio Edison Co.*, Case No. 08-1230-EL-CSS, Finding and Order at ¶ 13 (October 28, 2009).

<sup>9</sup> *Id.*

<sup>10</sup> See Complaint of Interstate Gas Supply, Inc. at ¶¶ 4-13 (February 1, 2019) (Complaint).

or claims. IGS does not even state whether the allegations are with regard to electric or natural gas services. The purportedly unlawful practices described in this section are devoid not only of evidence of wrongdoing by Santanna but also of any claim that IGS has been injured as a result of the practices that it describes. In fact, there is absolutely no connection of the allegations to Santanna or to any of Santanna's representatives, agents, or contractors. Nonetheless, Santanna will address each of IGS's baseless legal conclusions in the next section, but before even addressing the individual legal conclusions in claims one through five, Santanna will illustrate how the practices alleged in IGS's Complaint are unsupported by evidence and how IGS fails to demonstrate that IGS has been harmed by the events that are allegedly occurring.

IGS begins its description of the scheme allegedly being perpetrated by Santanna by stating that Santanna representatives have been calling IGS customers and others from two specific telephone numbers and representing themselves as agents of "IDS Energy."<sup>11</sup> Despite plainly alleging that the callers from those numbers identified themselves as being from "IDS Energy," IGS avers, without a shred of evidence that the individuals using the telephone numbers listed in the eighth paragraph of the Complaint were actually representatives of Santanna when, in fact, Santanna does not have any authorized representatives using the numbers listed in the Complaint. Further, IGS does not allege that Santanna's name is mentioned on these calls.<sup>12</sup> Conversely, IGS admits that "IDS Energy" is not affiliated with Santanna.<sup>13</sup> Essentially, IGS is alleging that Santanna is

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<sup>11</sup> Complaint at ¶ 8.

<sup>12</sup> Id. at ¶¶ 8-11.

<sup>13</sup> Id. at ¶ 9.

responsible for a call made by a number to which it has no connection and during which calls Santanna is not alleged to have been mentioned.

IGS then proceeds to claim that certain representations were made to IGS customers and others regarding the expiration of a low fixed rate plan.<sup>14</sup> Notably, these are the same alleged statements made by a sales representative in a prior complaint against a different competitor. Interestingly, however, IGS does not allege that any of the claimed representations were not true or provide other evidence that the representations were untrue. All IGS states is that Santanna is apparently acting to “mislead” IGS customers into believing that Santanna is somehow affiliated with IGS so that the customer then calls Santanna about the status of their account.<sup>15</sup> IGS fails to explain how a customer who is first told that they are speaking with an IDS Energy representative and then who is allegedly told to contact a different company, Santanna, has been misled to believe that they are actually speaking with an IGS representative or will be contacting IGS to confer about the status of their account. IGS also does not allege that any customers have actually reported being misled by any of these phone calls by Santanna (not IDS Energy).

Finally, despite claiming that the alleged conduct is “ongoing” and “harmful to IGS’s business and reputation,”<sup>16</sup> IGS does not provide any evidence that these alleged calls are still being made or that a single customer has switched from IGS to Santanna as a result of these calls. Without even an allegation that IGS has lost business or otherwise been harmed as a result of the alleged conduct, IGS has failed to allege facts necessary for

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<sup>14</sup> Complaint at ¶ 10.

<sup>15</sup> Id. at ¶ 11.

<sup>16</sup> Id. at ¶ 13.



the Commission to find that IGS has even suffered harm as a result of Santanna's—or anyone else's—alleged conduct.

These factual grounds do not amount to a complaint that can stand on its own. The lack of evidence connecting Santanna to the purported wrongdoers, the inability of IGS to allege harm that has resulted from the actions that it alleges in this Complaint, and the general lack of specific evidence underlying the factual scenario described are fatal to IGS's attempt to state reasonable grounds for the Complaint. Accordingly, the Complaint as a whole should be dismissed with prejudice.

**B. Each of IGS's Five Claims for Relief Is Unsupported by Factual Allegations.**

In addition to its failed attempt to describe actions sufficient to sustain its Complaint, IGS fails to plead specific allegations in support of its individual legal claims. As noted above, IGS asserts a set of generic factual allegations in the "Background" section of the Complaint,<sup>17</sup> and then attempts to use those factual allegations as the basis for its assertion of five legal claims against Santanna under various provisions of Ohio law and Commission rules, several of which are duplicative.<sup>18</sup> As discussed previously, IGS is required to make factual allegations sufficient to support each of its five legal claims such that the Commission can find sufficient factual allegations contained in the four corners of the Complaint to constitute the elements of the claims asserted by IGS.<sup>19</sup> Santanna addresses the deficiencies of each claim separately below.

Santanna notes that each claim is made under one or both of R.C. 4928.10 and 4929.22, in addition to provisions of the Commission's rules. Neither R.C. 4928.10 nor

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<sup>17</sup> See Complaint at ¶¶ 4-13.

<sup>18</sup> Id. at ¶¶ 14-26.

<sup>19</sup> See *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 19, 688 N.E.2d 506 (1998).

4929.22 imposes enforceable requirements against Santanna, except to the extent that those statutes are the statutory basis for the Commissions' promulgation of the rules at issue in the Complaint. Thus, these statutes can only possibly be violated by a party if it fails to abide by the rules issued by the Commission under the statutes. As such, in addressing the individual claims brought by IGS, Santanna's analysis is focused on the Commission's rules that IGS claims Santanna has violated.

- i. IGS Failed to Plead Factual Allegations Sufficient to Support Its First Claim that Santanna Violated Ohio Adm. Code 4901:1-21-05(C) and R.C. 4928.10.

IGS's First Claim is premised on the general allegation that Santanna used misleading, deceptive, and unconscionable sales and marketing practices in soliciting electric customers. Specifically, IGS alleges that Santanna violated Ohio Adm. Code 4901:1-21-05(C) and R.C. 4928.10. However, IGS has not alleged facts to support a claim of violation of this rule. Ohio Adm. Code 4901:1-21-05(C) provides that:

No CRES provider may engage in marketing, solicitation, or sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES.

Following the initial provision, the rule enumerates several practices that are included in the rule's proscription.<sup>20</sup> IGS does not allege that Santanna committed any of these specific practices, but rather that Santanna generally unfairly, misleadingly, deceptively, and unconscionably marketed its services in violation of Ohio Adm. Code 4901:1-21-05(C). IGS states that Santanna's "representation, whether express or implied,

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<sup>20</sup> See Ohio Adm. Code 4901:1-21-05(C)(1)-(11).

that it was soliciting electric customers on behalf of Complainant constitutes a misleading, deceptive, and unconscionable sales and marketing practice.”<sup>21</sup>

The Complaint does not contain allegations that Santanna expressly or impliedly represented that it was marketing electric services on behalf of IGS. In fact, until this paragraph, IGS did not even allege that the allegations were regarding electric service. Thus, under *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 19, 688 N.E.2d 506 (1998), IGS has failed to state reasonable grounds for a complaint because its Complaint does not contain factual allegations that, if true, would support its claims. IGS does not allege that Santanna solicited electric customers by stating that it was doing so on behalf of IGS, so there is no allegation of an expressed representation that Santanna was soliciting customers by claiming to be working for IGS. IGS's claim appears to rest on the single allegation that Santanna representatives claimed to be calling customers on behalf of “IDS Energy.” But IGS does not make factual allegations sufficient to create a nexus between Santanna and the individuals allegedly claiming to be account managers for IDS Energy.

IGS does not allege that Santanna directed any employees, agents, or contractors to claim to work on behalf of IDS Energy. IGS does not allege that any of Santanna's marketing scripts or training materials instructed its employees or contractors to state that they work on behalf of IDS Energy. IGS also does not allege that any IGS customers were offered a Santanna product or service under the guise that the product or service was actually an IGS product. Put another way, IGS does not allege that when a customer ultimately chooses to accept an offer for Santanna's products or services, he or she is under

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<sup>21</sup> See Complaint at ¶ 15.

the belief that they are actually accepting an offer from IGS. In fact, IGS's own allegation states that "Respondent then solicits the IGS customer with a different offer to enroll with Respondent's products and services."<sup>22</sup> It is not a misleading, deceptive, or unconscionable sales or marketing practice for Santanna representatives to solicit IGS customers with offers for Santanna's products or services. An IGS customer who is presented with an offer for products or services from Santanna, knowing that Santanna is the entity making the offer, has not been deceived or misled; he or she has simply made a choice to purchase products and services from a different supplier, as Ohio law affords customers the right to do. Therefore, IGS has not alleged a violation of Ohio Adm. Code 4901:1-21-05(C) or R.C. 4928.10, and, thus, the First Claim should be dismissed.

- ii. IGS Failed to Plead Factual Allegations Sufficient to Support Its Second Claim that Santanna Violated Ohio Adm. Code 4901:1-29-05(D) and R.C. 4929.22.

IGS next alleges that Santanna has violated Ohio Adm. Code 4901:1-29-05(D) and R.C. 4929.22. These provisions are regarding competitive retail natural gas suppliers (CRNGS) and operate in a similar manner to the provisions related to electric suppliers that are the subject of IGS's First Claim, discussed above. R.C. 4929.22 authorizes the Commission to adopt rules related to minimum service requirements for CRNGS, which the Commission has done through Ohio Adm. Code 4901:1-29-05. Ohio Adm. Code 4901:1-29-05(D) provides that:

No retail natural gas supplier or governmental aggregator may engage in marketing, solicitation, sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a competitive retail natural gas service.

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<sup>22</sup> Complaint at ¶ 12.

This rule mirrors Ohio Adm. Code 4901:1-21-05(C), discussed in the analysis of IGS's First Claim, except that it concerns retail natural gas suppliers rather than retail electric suppliers. Like Ohio Adm. Code 4901:1-21-05(C), Ohio Adm. Code 4901:1-29-05(D) lists a number of specific practices that are prohibited by the rule, and, as was the case with IGS's First Claim against Santanna, IGS does not allege that Santanna violated any of the specifically-enumerated prohibitions in the rule. Instead, IGS appears to suggest that Santanna has generally committed unfair, misleading, deceptive, or unconscionable sales or marketing practices. In fact, until this paragraph, IGS did not even allege that the allegations were regarding natural gas service.

The allegations that supposedly support this claim appear to be the same, generic allegations that supported IGS's First Claim against Santanna. Neither claim sets forth specific allegations or facts with regard to a specific competitive service. Accordingly, it is still the case that IGS has not alleged that a single customer was offered natural gas products or services by Santanna with a representation that those products or services were being offered by IGS. Thus, in the interest of efficiency, Santanna will simply adopt and incorporate the arguments contained in part (A)(i) of this section and state that IGS has not plead allegations sufficient to support a claim that Santanna unfairly, misleadingly, deceptively, or unconscionably solicited customers regarding Santanna's natural gas services. Therefore, IGS has not alleged a violation of Ohio Adm. Code 4901:1-29-05(D) and R.C. 4929.22, and, thus, the Second Claim should be dismissed.

- iii. IGS Has Failed to Plead Allegations Sufficient to Support Its Third Claim that Santanna Violated Ohio Adm. Code 4901:1-29-05(D)(8)(a) or 4901:1-21-05(C)(8)(a) or that Santanna Has Violated R.C. 4928.10 or R.C. 4929.22.

In its Third Claim, IGS relies upon the same Commission rules and statutory provisions used as the basis for its First and Second Claims. This time, IGS states that Santanna has violated one of the specific proscriptions contained in those rules. Specifically, IGS claims that Santanna has violated Ohio Adm. Code 4901:1-21-05(C)(8)(a) and 4901:1-29-05(D)(8)(a). These two provisions prohibit:

(8) Advertising or marketing offers that:

(a) Claim that a specific price advantage, savings, or guarantee exists if it does not.

This allegation fails on its face. Per IGS, the purported statement that violates this rule is a statement that the “customer’s ‘low fixed rate plan’ has expired and will roll over to a variable rate plan ‘that can go very high [in] any given month.’” Even if the Commission accepts the allegation that Santanna or one of its authorized contractors made this statement as true for purposes of considering this motion, the statement does not support IGS’s Third Claim. The purported statement makes no claim of a price advantage, savings, or guarantee. A statement that does not assert that a price advantage, savings, or guarantee exists cannot possibly violate either Ohio Adm. Code 4901:1-21-05(C)(8)(a) or 4901:1-29-05(D)(8)(a). Additionally, IGS does not allege that the representations allegedly made by Santanna’s representatives are untrue. As such, IGS’s Third Claim should be dismissed because IGS has not pled facts sufficient to support the claim.

- iv. IGS Has Failed to Plead Allegations Sufficient to Support Its Fourth Claim that Santanna Violated Ohio Adm. Code 4901:1-29-05(D)(5) or 4901:1-21-05(C)(10) or R.C. 4928.10 or 4929.22.

IGS brings its Fourth Claim under Ohio Adm. Code 4901:1-29-05(D)(5) and 4901:1-21-05(C)(10). These provisions prohibit electric and natural gas suppliers from “engaging in any solicitation that leads the customer to believe that the [supplier] or its agent is soliciting on behalf of or is an agent of any entity other than the [supplier].” As discussed above, IGS has not alleged facts that support a claim that Santanna has violated either of these provisions.

Specifically, IGS has not alleged facts that connect Santanna to the representatives purportedly making these calls on behalf of “IDS Energy.” The only purported evidence that IGS provides are the phone numbers that were allegedly used to make these calls. Importantly, however, IGS does not allege facts connecting Santanna to those phone numbers. Moreover, Santanna does not have authorized representatives or contractors who use these telephone numbers to solicit on behalf of Santanna. Because IGS has not alleged facts to support a claim that Santanna or its purported agents actually referenced a non-existent entity called “IDS Energy,” that Santanna or its purported agents made any connection between IDS Energy and Santanna, or that Santanna or its purported agents misled or deceived customers, IGS has failed to plead allegations that would support a claim that Santanna has violated either Ohio Adm. Code 4901:1-29-05(D)(5) or 4901:1-21-05(C)(10). As such, IGS’s Fourth Claim should be dismissed.

- v. IGS Has Not Alleged Facts Sufficient to Support Its Fifth Claim that Santanna Has Violated Ohio Adm. Code 4901:1-29-06(E)(1) or R.C. 4929.22.

IGS's final claim is that Santanna violated Ohio Adm. Code 4901:1-29-06(E)(1). This rule requires a retail natural gas supplier that is soliciting a customer telephonically to make a "date- and time-stamped audio recording of the sales portion of the call, if the customer is enrolled, and before the completion of the enrollment process, a date- and time-stamped audio recording by an independent third-party verifier that verifies, at a minimum," certain specified information.

IGS has failed to support this claim for one specific reason: it has not alleged that Santanna enrolled any customers as a result of the alleged practices that IGS describes. The rule explicitly provides that it applies only in cases where the customer is ultimately enrolled. IGS never actually alleges that Santanna enrolled any new customers, only that it unlawfully and inappropriately solicited customers. Without any alleged enrollments that Santanna was required to make recordings of, IGS has failed to allege facts that support its claim of a violation of Ohio Adm. Code 4901:1-29-06(E)(1). As such, IGS's Fifth Claim should be dismissed.

**C. IGS Improperly Attempts to Hold Santanna Responsible for the Purported Actions of a Rogue Contractor.**

Santanna acknowledges that it may use third-party vendors for purposes of providing sales and marketing services to Santanna in Ohio and elsewhere. Such vendors are retained as independent contractors in order to assist Santanna in the marketing and sales of Santanna's business products on behalf of Santanna, not to sell the products of a fictitious company. When Santanna has retained vendors to assist it, it has clearly laid out the scope of the relationship through agreements retaining those third-party vendors and has required its contractors to perform the services in strict accordance with currently



approved methods and practices related to promoting Santanna's business products. Santanna also requires its vendors to use Santanna's sales and marketing scripts without alteration or deviation. Santanna has never directed a third party vendor to represent that he or she was speaking on behalf of "IDS Energy" or any other entity nor would such method and practice be an approved method and practice. Further, Santanna requires all contractors to perform services in an ethical, satisfactory, competent, efficient, and professional manner with the highest standards of honesty and integrity and not to engage in any conduct that may cause harm to Company. A contractor representing him or herself as an employee of a fictitious company would be in strict violation of the terms of the agreements Santanna has with its vendors. As such, any contractor making such a representation would be acting as a rogue contractor and not as a representative of Santanna.

The Supreme Court of Ohio has long held that an employer or principal, in general, is not liable for the negligence of an independent contractor.<sup>23</sup> IGS appears to be alleging that Santanna is liable for the actions of others under a *respondeat superior* theory of liability, which is premised on the fact that the superior has control over an employee or agent, specifically of the right to control the mode and manner of doing the work contracted for.<sup>24</sup> Independent contractor status is established when the employer, in this case Santanna, does not retain the right to control the mode and manner of doing the work.<sup>25</sup> While Santanna's contracts with its third-party vendors establish general parameters (which do not include any of the allegations contained in IGS's Complaint), it does not

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<sup>23</sup> See, e.g., *Clark v. Southview Hospital and Family Health Center*, 68 Ohio St.3d 435, 438, 628 N.E. 46 (1994)

<sup>24</sup> *Council v. Douglas*, 163 Ohio St. 292, 292, 126 N.E.2d 597 (1955).

<sup>25</sup> *Id.* at 295.

retain the right to specifically control the mode and manner of the work. As such, it would not be liable for the alleged actions committed by these third-party independent contractors.

Moreover, the Supreme Court of Ohio has held that even if someone acts an agent for an entity in some instances, it is not the case that the individual is acting as an agent in *all* cases.<sup>26</sup> Specifically, self-serving acts of agents that do not promote the interests of the employer do not fall within the scope of agency.<sup>27</sup> The Court has further held that “an intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person is a clear departure from employment and the principal or employer is not responsible therefor.”<sup>28</sup> If, as IGS alleges here, a contracted salesperson deviated from their contracted commitments to further their own self-interest or enhance their own commission compensation, Santanna is not responsible for the actions of that contractor.

**D. IGS Has Improperly Sought Relief that the Commission Is Unable to Afford.**

Even if the Commission finds that IGS has somehow stated reasonable grounds for a complaint and/or that IGS has plead sufficient factual allegations to support each of its claims, the Commission should still dismiss IGS’s request for treble damages and injunctive relief as IGS has asked the Commission to afford relief that it is statutorily unable to provide.

- i. IGS’ request for treble damages should be dismissed as the Commission has no power to provide such relief.

In its third request for relief, IGS requests that the Commission award IGS treble damages under R.C. 4905.61. That statute provides:

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<sup>26</sup> See *Auer v. Paliath*, 140 Ohio St.3d 276, 2014-Ohio-3632, 17 N.E.3d 561, ¶ 40.

<sup>27</sup> *Id.* (citing *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 32).

<sup>28</sup> *Schulman v. City of Cleveland*, 30 Ohio St.2d 196, 198, 283 N.E.2d 175 (1972).

If any public utility or railroad does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by the provisions of those chapters, or by order of the public utilities commission, the public utility or railroad is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission. Any recovery under this section does not affect a recovery by the state for any penalty provided for in the chapters.

This claim fails for multiple reasons. First, the Commission is not permitted under statute to award treble damages. The Supreme Court of Ohio has held that an action for treble damages is to be brought in a common pleas court *after* a complaint has been successfully prosecuted before the Commission.<sup>29</sup> Thus, despite IGS's request for relief, the Commission is unable to award treble damages.

Moreover, the chapters of the Ohio Revised Code underlying the claims in the Complaint are R.C. Chapters 4928 and 4929. R.C. 4905.61 lists specified chapters that can trigger the treble damages provision, and R.C. 4928 and R.C. 4929 are not listed. Thus, even if the Commission had jurisdiction to award damages under the statute, it could not do so because IGS has not made allegations that would even be capable of invoking the statute.

Additionally, IGS states that the Commission has jurisdiction over the Complaint pursuant to R.C. 4928.16. A review of R.C. 4928.16 demonstrates that the relief requested by IGS is explicitly excluded from the relief that the Commission may order. R.C. 4928.16(B) sets forth the remedies that the Commission may pursue. R.C. 4928.16(B)(3) specifically provides remedies regarding violations by electric services companies (i.e.,

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<sup>29</sup> See *Milligan v. Ohio Bell Telephone Co.*, 56 Ohio St.2d 191, 194, 383 N.E.2d 575 (1978).

Santanna) and treble damages under R.C. 4905.61 is notably excluded from such available remedies. Instead, R.C. 4928.16(D) specifically allows for such a remedy only as it pertains to certain violations by an electric utility, not a competitive supplier. Accordingly, the Commission should dismiss IGS's request for treble damages.

- ii. IGS' request for injunctive relief should be dismissed as the Commission has no power to provide such relief.

In its fourth request for relief, IGS requests that the Commission preliminarily and permanently enjoin Santanna from engaging in the deceptive and unfair practices alleged in the Complaint. Such relief is beyond the scope of the Commission's jurisdiction. The Supreme Court of Ohio has held that the General Assembly has granted the power of injunctive relief solely to the courts and has conferred no such right upon the Commission, and if the Commission exercises such power, it exceeds its statutory jurisdiction. *Penn Cent. Transp. Co. v. Public Utilities Comm.*, 35 Ohio St. 2d 97, 100-01, 298 N.E.2d 587, 1973 Ohio LEXIS 316, \*3. The Commission is a creature of statute and may exercise no jurisdiction beyond that conferred by statute. *Id.* Accordingly, the Commission should dismiss IGS's request for injunctive relief.

**E. The Commission Should Assess Appropriate Sanctions Against IGS for Filing this Frivolous Complaint in an Attempt to Eliminate Its Own Competition.**

Under R.C. 4905.54, the Commission has authority to assess sanctions of up to \$10,000 per day for failure to comply with the Commission's orders, directions, and requirements made under the provisions of various Chapters of the Revised Code, including Chapter 4905. IGS files this Complaint under R.C. 4905.26. Accordingly, the Commission has authority to assess sanctions for failure to comply with the Commission's rules governing Complaint proceedings, which are enumerated in Ohio Adm. Code 4901-1-9. IGS failed to comply with these rules.

Specifically, Ohio Adm. Code 4901-9-01 requires that a complaint must “clearly explain[] the facts which constitute the basis of the complaint.” As noted above, IGS has not alleged facts specific to Santanna and instead essentially replicated a complaint<sup>30</sup> it had previously used to extract a public settlement from another competitor.<sup>31</sup> IGS appears to intend to subject Santanna to the same fate as its previous competitor by using this Complaint to drive Santanna out of Ohio’s competitive markets. This frivolous and harassing abuse of the Commission’s complaint procedures fails to comply with the Commission’s rules promulgated under R.C. 4905.26 in Ohio Adm. Code 4901-9-01. Thus, the conduct is sanctionable under R.C. 4905.54.

Assessing sanctions against IGS would send a message that the Commission will not allow competitive suppliers to target their competitors in an attempt to harm the reputations of its competitors, to thwart competitors’ sales efforts in the market, and/or to eliminate the competitors from the Ohio market one-by-one through use of form, cookie-cutter complaints that do not allege facts specific to the targeted competitor. Taking this stand and imposing consequences upon IGS for its frivolous actions would be a major step towards fortifying the competitive market such that all entities that are able to serve as competitive suppliers are afforded the opportunity to do so, to the benefit of all Ohioans.

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<sup>30</sup> Cf. Complaint (February 1, 2019), with *IGS v. Titan Gas*, 17-2452-GE-CSS, Complaint (December 1, 2017).

<sup>31</sup> *IGS v. Titan Gas*, 17-2452-GE-CSS, Joint Motion to Dismiss (December 21, 2018).

#### IV. CONCLUSION

IGS's Complaint does not tie specific factual allegations to Ohio statutes or Commission rules and fails to make allegations that support its claims of purported wrongdoing by Santanna. Rather, this Complaint is a thinly-veiled attempt to stomp out IGS's competition as a competitive supplier in Ohio; it is an unjustified shakedown of a company that has acted within the bounds of Ohio law. The Commission should dispose of this frivolous and unfounded Complaint that lacks coherent, supporting factual allegations and asks for relief that the Commission is plainly unable to afford. Accordingly, and for the reasons discussed herein, the Commission should dismiss IGS's Complaint with prejudice.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on February 21, 2019.

  
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