

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of)	
)	
Interstate Gas Supply, Inc.)	Case No. 19-362-GE-CSS
d/b/a IGS Energy)	
6100 Emerald Parkway)	
Dublin, Ohio 43016)	
)	
Complainant,)	
)	
v.)	
)	
Santanna Natural Gas Corporation)	
d/b/a Santanna Energy Services)	
7701 San Felipe Blvd., Suite 200)	
Austin, TX 78729)	
)	
Respondent.)	

**INTERSTATE GAS SUPPLY, INC.’s MEMORANDUM CONTRA SANTANNA
NATURAL GAS CORPORATION’S MOTION TO DISMISS**

I. INTRODUCTION

On February 1, 2019, Interstate Gas Supply Inc. (“IGS” or “IGS Energy”) filed a complaint with the Public Utilities Commission of Ohio (“PUCO” or “Commission”) against Santanna Natural Gas Corporation (“Santanna”), alleging that it willfully violated Ohio law by engaging in sales and marketing practices that were intended to mislead and deceive residential and commercial electric and natural gas customers.

On February 21, 2019, Santanna filed a motion asking the Commission to dismiss the Complaint with prejudice. Santanna asserts that IGS’ Complaint should be permanently dismissed

because it does not set forth reasonable grounds to demonstrate that Santanna failed to comply with Ohio law. In the alternative, Santanna moves to dismiss IGS' third and fourth requests for relief arguing that the Commission is unable to provide the relief requested under Ohio law.¹

Stripping away all of the hyperbole, Santanna's arguments do not support dismissal of any of the claims or requests for relief identified in IGS' Complaint. The supporting memorandum it filed contemporaneously with its Motion is also procedurally improper. For the reasons set forth below, the Commission should deny Santanna's Motion to Dismiss.

II. STANDARD OF REVIEW

The framework under which the Commission evaluates motions to dismiss is well-established. The Commission has previously held that "when a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party."² To survive a motion to dismiss, the plaintiff must only show some set of facts that would entitle it to relief.³ Indeed, a complaint may only be dismissed after the Commission determines beyond a reasonable doubt that the plaintiff can prove no set of facts to warrant a recovery.⁴

III. ARGUMENT

A. Santanna's Motion to Dismiss IGS' Complaint Should Be Denied Because the Complaint Clearly Sets Forth Facts in a Manner Sufficient to Allow Recovery.

¹ Santanna Motion to Dismiss, at 2.

² *OCC v. Dominion Retail*, Case No. 09-257-GA-CSS, Entry (July 1, 2009) at 3, citing *In the Matter of the Complaint of XO, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (July 1, 2003).

³ *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, at ¶ 44

⁴ *Id.* at ¶ 49.

Santanna moves to dismiss IGS' Complaint on a finding that it does not contain factual allegations necessary to sustain its claims as required by Ohio Adm. Code 4901-9-01(B).⁵ Specifically, Santanna argues that each of IGS' five claims should be dismissed because the Complaint not only fails to allege "crucial facts" necessary to support its claims and requests for relief, but also does not provide "evidence" to connect Santanna to the improper practices that form the basis of the Complaint.⁶ Santanna's motion to dismiss exaggerates the requirements to file an actionable complaint under Ohio law and the Commission's rules, and, therefore, should be denied.

i. IGS' Complaint is Not Required to Satisfy an Evidentiary Standard to Survive a Motion to Dismiss.

The Commission's rules require that all complaints filed pursuant to R.C. 4905.26 need only set forth "the facts which constitute the basis of the complaint, and the relief sought."⁷ Santanna first argues that IGS' Complaint fails to satisfy the pleading standard because it has not provided evidence to link Santanna to the events at issue in the Complaint or to any claim that IGS has been harmed by the practices described.⁸ Despite its acknowledgement that the factual allegations set forth in IGS' Complaint include "two specific telephone numbers" and a partial transcript of the sales pitch used by its representatives to solicit customers⁹, Santanna argues that IGS' pleading is deficient because it does not include specific evidence to connect Santanna to the alleged bad acts. Santanna also argues that IGS' Complaint fails to demonstrate harm because it

⁵ Santanna Motion to Dismiss, at 2.

⁶ *Id.*

⁷ Ohio Adm. Code 4901-9-01(B).

⁸ Santanna Motion to Dismiss, at 5.

⁹ *Id.* at 5-6.

does not provide any evidence to support the claim that its representatives' conduct is ongoing or that IGS has lost business due the alleged misconduct.¹⁰ Essentially, Santanna urges the Commission to adopt a heightened pleading standard that would require the factual allegations set forth in the Complaint to include evidence specific enough to prove the entirety of IGS' case at the initial pleading stage.

IGS, however, is not required to satisfy an evidentiary standard under traditional notice pleading requirements. Contrary to Santanna's assertions, a requirement that IGS provide specific evidence that links Santanna to the allegations contained in its Complaint goes well beyond the pleading requirements set forth under Ohio law and the Commission's rules.¹¹ Indeed, IGS is under no obligation to prove its case at the pleading stage.¹² A requirement that IGS' Complaint include specific evidence to support its claims is shortsighted and overlooks the fact that "the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession."¹³

To be clear, IGS certainly has additional evidence that demonstrates that Santanna did in-fact engage in the actions described in the Complaint. But IGS is not required to present its entire case in its Complaint. A complaint is not a substitute for a hearing. IGS is only required to present claims for which relief can be granted, and its pleading set forth the facts which constitute the basis for each of the five claims asserted and includes statements of the relief requested. Nothing more

¹⁰ *Id.* at 6.

¹¹ See R.C. 4905.26, Ohio Adm. Code 4901-9-01(B).

¹² *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, at ¶ 50

¹³ *Id.*

is required. Accordingly, the Commission should deny Santanna's Motion to Dismiss the entirety of IGS' Complaint with prejudice.

ii. IGS' Requests for Relief Are Supported by Factual Allegations.

Similarly, Santanna also seeks to dismiss IGS' Complaint on a finding that it is factually deficient. Santanna addresses each IGS' claim separately, yet each element of its motion asserts a variation of the same claim – the “generic factual allegations” set forth in the ‘Background’ section of IGS' Complaint are not specific enough for the Commission to determine whether sufficient factual allegations exists to support each of IGS' five causes of action.¹⁴ Santanna's claim is patently false.

Here again, Santanna overlooks the fact that IGS is not required to prove its case at the pleading stage.¹⁵ As mentioned previously, Ohio law and the Commission's rules provide that IGS' Complaint need only explain the facts which constitute the basis of the complaint and a statement of the relief sought.¹⁶ The Court's reasoning when considering whether a Complaint should survive a motion to dismiss for failure to state a claim is simple: “[i]f the plaintiff were required to prove [its] case in the complaint, many valid claims would be dismissed because of the plaintiff's access to relevant evidence.” *Id.* The Court has held, and the Commission should find, that “as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.” *Id.*

IGS' complaint satisfies the requirements of Ohio Adm. Code 4901-9-01(B) by stating the facts, as IGS knew them to be at the time of filing, in a manner sufficient to provide Santanna and

¹⁴ Santanna Motion to Dismiss, at 7.

¹⁵ *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, at ¶ 50

¹⁶ See R.C. 4905.26; Ohio Adm. Code 4901-9-01(B).

the Commission with fair notice of the claims asserted. IGS' complaint clearly states that a sales representative claiming to work for "IDS Energy" knowingly mislead customers to solicit retail electric and natural gas products on Santanna's behalf.¹⁷ The Complaint also provided an approximate date the misconduct began¹⁸, the manner in which the alleged infractions were carried out over the phone¹⁹, and two specific examples of the telephone numbers Santanna's agents used²⁰ to place the calls in question. Moreover, the Complaint succinctly states that Santanna's agents did not make a recording of the sales portion of the telephone call that resulted in a customer enrollment²¹, which is a factual allegation that the Commission must accept as true for purposes of considering a motion to dismiss.²²

The facts asserted in its complaint are specific enough to warrant recovery under Ohio law. IGS has presented sufficient facts in support of its claims that Santanna violated OAC 4901:1-21-05(C), 4901:1-29-05(D), 4901:1-29-05(D)(8)(a), 4901:1-21-05(C)(8)(a), 4901:1-29-05(D)(5), 4901:1-21-05(C)(10), 4901:1-29-06(E)(1), as well as R.C.4928.10 and R.C. 4929.22. Therefore, Santanna's Motion to Dismiss IGS' Complaint in its entirety for failure to state a claim should be denied.

B. Santanna's Motion to Dismiss IGS' Requests for Treble Damages and Injunctive Relief Should be Denied.

¹⁷ Complaint at ¶ 8-12, 15, 18, 24.

¹⁸ *Id.* at ¶ 8.

¹⁹ *Id.* at ¶ 10.

²⁰ *Id.* at ¶ 8.

²¹ *Id.* at ¶ 26.

²² *OCC v. Dominion Retail*, Case No. 09-257-GA-CSS, Entry (July 1, 2009) at 3, citing *In the Matter of the Complaint of XO, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (July 1, 2003).

Santanna moves to dismiss IGS' requests for treble damages and injunctive relief arguing that the Commission is statutorily prohibited to provide the relief requested.²³ As explained below, Santanna's arguments for dismissal seek to deprive the Commission of its lawful authority to issue the remedies requested in this proceeding and should be denied.

i. Santanna's Motion to Dismiss IGS' Request for Treble Damages Should Be Denied Because Santanna has Violated Commission Orders and Directives, and as a Public Utility, is Subject to an Award of Treble Damages Under R.C. 4905.61.

Santanna moves to dismiss IGS' request for treble damages based on three separate arguments. First, Santanna argues that IGS' request for relief is beyond the Commission's jurisdiction since an action for treble damages is generally heard before a common pleas court after a complaint has been successfully prosecuted at the Commission.²⁴ Santanna, however, seems to misunderstand IGS' intentions. The Court has plainly stated that a *prerequisite step* to an award of treble damages at the court of common pleas is a determination of fault by the Commission.²⁵ To be clear, IGS did not necessarily include its request for treble damages in the pleading to seek an award from the Commission directly. Rather, IGS' request for relief was intended to serve as a placeholder and set the foundation for future proceedings in the event of a Commission determination of fault. The Commission, therefore, should preserve IGS' request for treble damages and deny Santanna's motion to dismiss.

Santanna also argues that treble damages are inappropriate because IGS has not alleged a violation of any provision of the Revised Code chapters listed in R.C. 4905.61 necessary for

²³ Santanna Motion to Dismiss, at 16.

²⁴ *Id.* at 17.

²⁵ See, *Northridge Corp v. Columbia Gas*, 49 Ohio App. 2d (1974) at 74.

recovery.²⁶ Here again, Santanna misses the point. To recover under 4905.61, a party must aver that the act committed by the “public utility” must be “declared to be unlawful” or in violation of an “order of the public utilities commission.” The Complaint alleges that Santanna committed several acts that the Commission has declared to be unlawful by Commission order. As explained more fully below, Santanna violated several provisions of Ohio law in its capacity as a “public utility;” therefore, treble damages are appropriate under R.C. 4905.61.

Santanna’s Answer concedes that it is an “electric services company” as that term is defined in R.C. 4928.01(A)(9).²⁷ As provided in R.C. 4928.01(A)(7), an “electric services company” is also an “electric light company”; therefore, Santanna is an “electric light company” under the Revised Code. An “electric light company” is defined as a “public utility” pursuant to R.C. 4905.03(C), “when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state.” Because Santanna supplies electricity for light, heat, or power purposes, it is an electric “public utility” as defined in R.C. 4905.03(C) and is therefore subject to an award of treble damages.

Santanna’s Answer also concedes that it is a “retail natural gas supplier” as defined in R.C. 4929.01(N).²⁸ This Commission has previously held that competitive retail natural gas suppliers are “public utilities” and are therefore subject to the jurisdiction and supervision of the Commission.²⁹ Accordingly, Santanna is also a natural gas “public utility” as that term is defined in R.C. 4905.03 and is similarly subject to an award of treble damages.

²⁶ Santanna Motion to Dismiss, at 17.

²⁷ Answer of Santanna Natural Gas Corporation, at 2.

²⁸ *Id.*

²⁹ See, *In the Matter of the Application of Commerce Energy, Inc. d/b/a Just Energy for Certification as a Competitive Retail Natural Gas Provider*, Case No. 02-1828-GA-CRS, Entry at 12 (November 22, 2010).

Finally, Santanna argues that IGS' request for treble damages should be denied because the relief requested is explicitly excluded under R.C. 4928.16.³⁰ Santanna's third argument is no different than its first in that it moves the Commission to dismiss IGS' request for treble damages based on a finding that the Commission is without the authority to provide the relief requested. For that reason, IGS' restates its position that its request for treble damages is intended to serve as a placeholder so that a court of competent jurisdiction may determine the amount of damages to award in the event of a Commission determination of fault. Notwithstanding the foregoing, Santanna's Motion to Dismiss IGS' claim for treble damages should be denied because Santanna has violated Commission orders and, as a "public utility," is subject to an award of treble damages under R.C. 4905.61.

ii. Santanna's Motion to Dismiss IGS' Request for Injunctive Relief Should be Denied Because the Commission has Jurisdiction to Hear Those Claims Which Are Within the Commission's Area of Expertise.

Santanna similarly moves to dismiss IGS' request for injunctive relief on a finding that the remedy requested is beyond the scope of the Commission's jurisdiction.³¹ In its memorandum, Santanna asserts that the Commission may exercise no jurisdiction beyond that conferred by statute, and since the General Assembly has granted the power of injunctive relief exclusively to the courts of Ohio the Commission is without the authority to provide the remedy requested in the Complaint.³² Here again, Santanna inappropriately seeks to deprive the Commission of its lawful authority to issue a remedy in this proceeding.

³⁰ Santanna Motion to Dismiss, at 17.

³¹ *Id.* at 18.

³² *Id.*

Contrary to Santanna’s argument, the Supreme Court of Ohio has determined that claims for injunctive relief can be heard before the Commission when the claims relate to matters within the Commission’s expertise, and the acts complained of constitute a practice normally authorized by the utility.³³ It is not the form of the action, but rather the substance of the allegations in the complaint that the Court examines to determine the proper jurisdiction.³⁴ Here, IGS’ claim for injunctive relief stems from Santanna’s repeated violations of the *Commission’s* consumer protection rules. (emphasis added). It is the Commission that is charged with regulating market behavior, and IGS’ claims of misrepresentation in violation of OAC Chapters 4901:1-29-05, 4901:1-21-05 and Revised Code Chapters 4928 and 4929 require the kind of review and analysis that the Commission is best suited to provide. Therefore, the Commission should also deny Santanna’s Motion to Dismiss IGS’ request for injunctive relief.

C. Santanna is Liable for the Acts of its Agents.

Santanna’s supporting memorandum attempts to absolve it from liability for its agents’ misleading and deceptive conduct because the agents it retained are independent contractors.³⁵ Santanna argues that since it did not contractually retain the right to control the mode and manner of the work its agents performed, it should not be held liable for any misconduct those agents committed while soliciting retail electric and natural gas services on its behalf.³⁶ Categorizing its agents’ conduct as “self-serving” and “a clear departure from employment,”³⁷ Santanna attempts

³³ See, *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144 (2012), at 9, citing *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824.

³⁴ *Id.*

³⁵ Santanna Motion to Dismiss, at 15.

³⁶ *Id.* at 15-16.

³⁷ *Id.* at 16.

to separate itself from misconduct that this Commission recently found other similarly structured retail market participants accountable for.³⁸ The Commission should find, however, that Santanna is liable for the acts of its agents under the doctrine of *respondeat superior*.

The Supreme Court of Ohio has held that in order for an employer to be liable under the doctrine of *respondeat superior*, the tort of the employee or agent must be committed within the scope of employment.³⁹ The determination of whether conduct is within the scope of employment turns on whether the agent acted, or believed himself to have acted, *at least in part*, in the employer's interests.⁴⁰ (emphasis added). Here, Santanna's agents intentionally misled customers and willfully violated the Commission's rules for the express purposes of facilitating retail electric and natural gas enrollments on Santanna's behalf. Though Santanna argues that its agents were motivated to "enhance their own commission compensation,"⁴¹ it cannot be overlooked that the behavior giving rise to IGS' claim was intended solely to promote Santanna's retail electric and natural gas interests. Accordingly, the Commission should hold Santanna liable for the acts identified in IGS' Complaint.

Further, Santanna's argument, if accepted, would lead to an absurd result whereby any retail supplier could absolve itself from liability for consumer protection violations simply by contracting its sales needs to third parties. Clearly this is not a policy the Commission should

³⁸ See, *In the Matter of Town Square Energy East*, Case No. 18-1785-EL-UNC, Entry at 2 (February 27, 2019); *In the Matter of ENGIE Retail, LLC D/B/A Think Energy*, Case No. 18-938-GE-UNC, Joint Stipulation and Recommendation at Exhibit A (June 5, 2018).

³⁹ See, *Auer v. Paliath*, 140 Ohio St. 3d 276, 17 N.E.3d 561 (2014).

⁴⁰ *Id.* at 281.

⁴¹ Santanna Motion to Dismiss, at 16.

promote and, as identified above, is directly contrary to past precedent where the Commission has levied fines and other penalties against suppliers for the misconduct of its third-party agents.⁴²

D. Santanna's Request for Sanctions is Procedurally Improper.

Santanna's supporting memorandum also urges the Commission to assess sanctions against IGS for its alleged failure to comply with the Commission's rules governing Complaint proceedings under Ohio Adm. Code 4901-9-01.⁴³ Santanna argues that IGS' conduct is sanctionable because it intends to subject Santanna "to the same fate" as another competitor and drive Santanna out of the Ohio competitive market.⁴⁴ The Commission should deny Santanna's request for sanctions because the request mischaracterizes the Commission's rules, is based upon flawed assumptions, and is procedurally improper.

As discussed at length above, IGS' Complaint satisfies the Commission's pleading standards in that it includes a detailed set of facts which constitute the basis for each of the five claims asserted and statements of the relief requested. Second, Santanna and IGS have not discussed the scope of the Complaint in any detail since the pleading was filed, so it would be impossible for Santanna to know IGS' intentions. Santanna seems to assume that because the facts alleged are similar to a previous claim IGS filed that the outcome of this proceeding will be the same. Santanna's assumption is incorrect. Third, and more importantly, Santanna failed to move for sanctions in its Motion; therefore, its request is procedurally improper under Ohio Adm. Code 4901-1-12. Accordingly, Santanna's request for sanctions should be denied.

⁴² See, *In the Matter of Town Square Energy East*, Case No. 18-1785-EL-UNC, Entry at 2 (February 27, 2019); *In the Matter of ENGIE Retail, LLC D/B/A Think Energy*, Case No. 18-938-GE-UNC, Joint Stipulation and Recommendation at Exhibit A (June 5, 2018).

⁴³ *Id.* at 18. Note that Santanna appears to inadvertently cite to Ohio Adm. Code 4901-1-9 to support its claim. IGS' understanding is that the intended citation is to Ohio Adm. Code 4901-9-01.

⁴⁴ *Id.*

IV. CONCLUSION

Santanna's Motion to Dismiss is based on flawed arguments. More importantly, IGS' Complaint provides reasonable grounds for a hearing pursuant to R.C. 4905.26. Based on the foregoing, the Commission should dismiss Santanna's Motion and set the Complaint for hearing.

Respectfully submitted,

Interstate Gas Supply, Inc.

/s/ **Michael Nugent**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Memorandum Contra Santanna Natural Gas Corporation's Motion to Dismiss* has been served upon the following persons via electronic mail this 8th day of March 2019.

/s/ **Michael Nugent**

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Summary: Memorandum Contra Santanna Natural Gas Corporation's Motion to Dismiss electronically filed by Mr. Michael A Nugent on behalf of Interstate Gas Supply, Inc.