

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 7
CAUSE NO. 49D07-0804-CC-018081

JASON BOND, DAVID LEAR, and)
LESLIE BRIDGES, individually and as)
class representatives of all those similarly)
situated,)

Plaintiffs,)

vs.)

VEOLIA WATER NORTH AMERICA)
OPERATING SERVICE, LLC, VEOLIA)
WATER INDIANAPOLIS, LLC, and)
THE CITY OF INDIANAPOLIS,)
DEPARTMENT OF WATERWORKS,)

Defendants.)

VEOLIA’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This Court previously dismissed, for failure to state cognizable claims, Plaintiffs’ claims against Veolia for breach of contract and for alleged violations of Indiana’s Deceptive Consumer Sales Act, both of which were based upon Plaintiffs’ central belief that Veolia breached a duty – owed to Plaintiffs – to read their water meters bi-monthly and to apply a particular estimating methodology when their meters were not actually read.

Plaintiffs’ Second Amended Complaint (“Complaint”) again asserts those same claims against Veolia, without any factual alteration. They should again be dismissed; they still do not state cognizable legal claims. As this Court previously found, Plaintiffs do not have contracts with Veolia, they did not enter any “consumer transactions” with Veolia, and they did not rely to their detriment on any misrepresentations.

Plaintiffs have filed a new claim against Veolia, alleging Veolia was “unjustly enriched” by Plaintiffs’ payment of estimated water bills. This claim also fails because Veolia did not receive any benefit from Plaintiffs’ alleged overpayment of their water bills.

There are no disputed issues of material fact and for each of the above reasons, Veolia is entitled to judgment as a matter of law on all of Plaintiffs’ claims against it. Summary judgment should be entered in Veolia’s favor on all issues raised in Plaintiffs’ Second Amended Complaint.

I. Statement of Undisputed Material Facts.

Provision of water to the citizenry is a governmental function. *See Metal Working Lubricants Co. v. Indianapolis Water Co.*, 746 N.E.2d 352 (Ind. Ct. App. 2001); *Sharp v. Frankfort Community Schools Building Trades Corp.*, 747 N.E.2d 1172, 1176 n.3 (Ind. Ct. App. 2001).

The Consolidated City of Indianapolis, Department of Waterworks (“City”) acquired the waterworks assets of IWC Resources Corporation (“Waterworks”) in March 2002, pursuant to a settlement agreement approved by the Indiana Utility Regulatory Commission (“IURC”). As a result, the City owns a water system for the collection, purification, conveyance, treatment and storage of water and distribution of water to its customers in Central Indiana, including Plaintiffs. (Complaint ¶¶ 3-4; March 28, 2002 Order of the IURC (“IURC Order”), a copy of which is attached as Exhibit 1 to Veolia’s Designation of Supporting Evidentiary Materials (“Designation”).

The Waterworks is a municipally-owned utility. *See* IURC Order. *See also* Ind. Code § 8-1-2-1(a). The Indiana statutes regulating municipally-owned utilities apply to the City, the owner of the water utility (“Waterworks”). These statutes require the City to set and charge

Waterworks customers reasonable rates. Ind. Code § 8-1.5-3-8(b). These rates are subject to approval by the IURC. Ind. Code § 8-1.5-3-8(f).

The IURC ordered the City to operate the Waterworks in accord with “the Commission’s Rules of Service and Main Extensions for Water Utilities, contained in 170 IAC 6-1 and 6-1.5.” (IURC Order at 9.) Through this order, the IURC ordered the City to specifically comply with 170 IAC 6-1-13(C), which authorizes the City to estimate customers’ water consumption, but requires that any such estimates be pursuant to a procedure approved by the IURC.

In August 2002, the City filed with the IURC a tariff, articulating the rules that would govern its relationship with its customers, a copy of which is attached to Plaintiffs’ Complaint as Exhibit B (“Tariff”). (Complaint ¶ 11.) As Plaintiffs admit, this Tariff establishes the terms of the City’s relationship with its customers. (Complaint ¶¶ 11, 12, 17, 20, 43). It states that its provisions “govern all water service rendered or to be rendered by the Department. They shall be binding upon every customer and constitute a part of the terms and conditions of every contract for water service whether expressly incorporated therein or not.” (Complaint, Exhibit B at 5.)

Consistent with 170 IAC 6-1 and 6-1.5 and the IURC’s Order, the Tariff, as Plaintiffs admit, obligates the City to read customers’ meters bi-monthly (except for individual circumstances that may preclude an actual read on any specific occasion) and describes the methodology for estimating customers’ water usage in those months where their meters are not actually read. (Complaint ¶¶ 11, 17, 20; Exhibit B at Rule 3(A).) Thus, Plaintiffs admit the Tariff is the source of the two duties that purportedly support all of their claims.

In March 2002, the City entered a Management Agreement with US Filter Operating Services, Inc., Veolia’s predecessor, pursuant to which Veolia agreed to manage and operate the

Waterworks for a period of twenty years. (Complaint ¶ 4; *see also* Affidavit of Kathy Baumes (“Baumes Aff.”), Exhibit A, attached as Exhibit 2 to Veolia’s Designation)¹ None of the consideration Veolia receives under the Management Agreement is affected by customers’ overpayment of their water bills or any payment of late fees. (Baumes Aff. ¶ 7) Thus, Veolia did not receive any benefit from Plaintiffs’ alleged overpayment of their water bills or payment of late fees. *Id.* ¶ 8.

Neither the IURC’s Order nor the water utility regulations, including 170 IAC 6-1-13(C), applies to Veolia. (Complaint ¶ 21.) In fact, there is no law, regulation, or ordinance that requires Veolia to read Plaintiffs’ meters bi-monthly or to use a particular estimating methodology. Rather, the Tariff’s requirements to read Plaintiffs’ meters bi-monthly and to follow a particular estimating methodology apply to Veolia only because of its promises in the Management Agreement to perform in accord with the City’s Tariff and in accord with 170 IAC 6-1-13(C). (Complaint ¶ 21.)

Plaintiffs’ alleged damages are not the amount of their alleged overpayments. Plaintiffs admit these allegedly improper overpayments have been “credited back” to them. (Complaint ¶ 35.) Plaintiffs’ claimed damages are limited to the time value (i.e. interest) on the alleged overcharge from the time of the overcharge until it appeared as a credit. *Id.*²

¹ Plaintiffs incorrectly allege that Veolia Water North America Operating Services, LLC, not Veolia Water Indianapolis, LLC, is the successor to US Filter Operating Services. This distinction is, however, immaterial to the present Motion to Dismiss as both are defendants in this action.

² For example, if a Plaintiff was billed \$100 in each of Months 1-6 based upon estimated usage (when the Plaintiff should have received an actual meter read sometime within those six months) and her actual consumption was later determined to be \$50 each of those six months, Plaintiff would receive a credit of \$50 for each of those six months. Her damages would be the time value of the \$50 overpayment for each of these six months until she received her \$300 credit. Assuming 6% interest, this hypothetical Plaintiff would have a damage claim of \$5.25.

II. Plaintiffs Cannot Assert A Claim Against Veolia For Breach Of The Tariff.

Plaintiffs alleged in their First Amended Complaint that Veolia breached a contract with them. They attached to their complaint the Management Agreement between the City and Veolia. Plaintiffs then argued they were third-party beneficiaries to this Agreement. In response to Veolia's Motion to Dismiss, Plaintiffs separately argued they could enforce the Tariff directly against Veolia because the definition of "Department" in the Tariff identified Veolia as the City's agent. (Plaintiffs' Response to Veolia's Motion to Dismiss at 13-15.)

Plaintiffs' Second Amended Complaint abandons Plaintiffs' argument that they are third-party beneficiaries of the Management Agreement, but re-asserts, without alteration, their claim that they can enforce the Tariff directly against Veolia.³ This Court has previously rejected this argument and dismissed Plaintiffs' breach of contract claim. It should do so again, because the allegations of Plaintiffs' claim have not changed.

Veolia previously demonstrated, and the Court agreed, that Plaintiffs' argument based on the language of the Tariff ignores and is contrary to both the express terms of the Tariff and black letter contract law. There is no reason for the Court to alter its prior ruling.

The Tariff defines "Department" as follows:

"Department" means the Department of Waterworks of the Consolidated City of Indianapolis, and shall also include, where the context so requires, the Consolidated City of Indianapolis itself, or any professional management firm that has been retained by the Department of Waterworks of the Consolidated City of Indianapolis to operate its water utility facilities and that is acting in its capacity as the agent or representative of the Department of Waterworks of the Consolidated City of Indianapolis.

³ Trial Rule 9.2 required Plaintiffs to attach to their Second Amended Complaint the contract they contend was allegedly breached. Plaintiffs did not attach the Management Agreement. Instead, they attach the Tariff, and they specifically refer to, although incompletely, the definition of "Department" in the Tariff as including Veolia. (Complaint ¶ 12.)

(Complaint, Exhibit B at 5) (emphasis supplied).⁴ This definition unambiguously identifies Veolia – the professional management firm – as the City’s agent for performance of the obligations in the Tariff.

It is black letter law that an agent of a disclosed principal is not a party to the transactions between the customer and the principal. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228 (Ind. 1994); *Carlson Wagonlit Travel, Inc. v. Moss*, 788 N.E.2d 501 (Ind. Ct. App. 2003). At most, the Tariff identifies Veolia as the City’s agent for purposes of performing the duties in the Tariff. But, if it is the City’s agent, Veolia is not a party to the Tariff and, as this Court previously found, it cannot be liable for its breach. Plaintiffs’ contrary position has no basis in either fact or law. The court should enter judgment in Veolia’s favor on this claim.

III. Plaintiffs Cannot State A Claim Under The Deceptive Consumer Sales Act.

This Court previously dismissed Plaintiffs’ claim against Veolia under Indiana’s Deceptive Consumer Sales Act (“Act”), finding it failed to state a cognizable claim. Nonetheless, Plaintiffs have asserted it again, without alteration. It should again be dismissed.

A. Plaintiffs did not enter “consumer transactions” with Veolia.

The Act attempts to protect consumers from over-reaching, fraud, and other, specifically-described, misleading business practices. The Act covers certain acts, assertions or representations of a “supplier” in the course of a “consumer transaction.”⁵ More simply, the Act

⁴ Plaintiffs have consistently selectively quoted this section of the Tariff, ignoring that portion that identifies Veolia as the City’s agent, because the Tariff, read in its entirety, guts Plaintiffs’ argument.

⁵ A “consumer transaction” is defined as:

A sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible, except securities and policies or contracts of insurance issued by corporations authorized to transact an insurance business under the laws of the state of Indiana, with or without an extension of credit, to a person for purposes that are primarily personal, familial, charitable, agricultural, or household, or a solicitation to supply any of these things. However, the term includes a transfer of structured settlement payment rights under [Indiana Code] § 34-50-2.

Ind. Code § 24-5-0.5-2(a)(1).

“codifies the elements of common law fraud” and thus decisions interpreting common law fraud are instructive in interpreting and applying the Act. *Schmidt Enters., Inc. v. State*, 354 N.E.2d 247, 253 (Ind. Ct. App. 1976).

Plaintiffs do not allege any facts showing they engaged in “consumer transactions” with Veolia – because they can’t. The City owns the Waterworks. (Complaint ¶ 3.) By statute, the City, not Veolia, sets and charges *its* customers reasonable rates. Ind. Code § 8-1.5-3-8(b). Similarly, Veolia did not set and is not (outside of its promises in the Management Agreement) bound by the City’s Tariff on file with the IURC. Rather, the City promulgated and filed the Tariff with the IURC. This Tariff articulates the terms governing the City’s relationships with its customers, including the frequency of meter reads and the methodology for estimating customer usage – the only two actions at issue in this case.

Consequently, as described above, and in accord with the Tariff’s express terms, Plaintiffs allege that they interacted with Veolia solely as the agent of the City. But, as noted above, the agent (Veolia) of a disclosed principal (the City) is not a party to the transactions between the customer and the principal. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228 (Ind. 1994); *Carlson Wagonlit Travel, Inc. v. Moss*, 788 N.E.2d 501 (Ind. Ct. App. 2003). There are no facts supporting Plaintiffs’ conclusion that they entered “consumer transactions” with Veolia. Thus, as this Court previously found, Plaintiffs’ claim under the Act does not state a cognizable claim against Veolia.

B. Veolia did not make a misrepresentation.

Plaintiffs contend that Veolia misrepresented to the Plaintiffs that their water bills were “compliant with regulatory requirements with respect to the frequency of meter reads, the means and methods of estimating, and the calculation of late charges[.]” (Complaint ¶ 49.) Plaintiffs,

however, do not allege the existence of any communications from Veolia other than the information provided on the water bills Veolia sent them.

Customers' water bills do not state that the methodologies for estimating Plaintiffs' consumption were "compliant with regulatory requirements with respect to the frequency of meter reads, the means and methods of estimating, and the calculation of late charges." (Baumes Aff. ¶ 9, Exhibit B.) There are no misrepresentations on these bills. Each bill that is derived from estimated usage contains a large "E" on the face of the bill and a legend, informing customers that this "E" means the bill is based upon estimated usage. *Id.* There is no reference to any applicable regulatory requirements. *Id.*

Given the absence of any misrepresentation from Veolia to Plaintiffs, Plaintiffs may be arguing that because Veolia promised the City in the Management Agreement that it would comply with all applicable laws, regulations and rules, Veolia somehow represented to the City's customers that their water bills would comply with Indiana regulations. *See* Complaint ¶ 49.⁶

This argument, though, also cannot support Plaintiffs' claim under the Act. Veolia made its promises in the Management Agreement to the City, not Plaintiffs. Plaintiffs cannot base a misrepresentation claim on statements not made to them. *Employee Benefit Managers, Inc. of America v. A Medex Transition Administration Co. Ltd.*, No. 1:04-CV-443-TS, 2005 U.S. Dist. LEXIS 6179 (N.D. Ind. April 1, 2005). *See also Lycan v. Walters*, 904 F.Supp. 884, 897 (S.D. Ind. 1995) ("simply stated, Plaintiffs cannot premise their fraud claim on statements that were not made to them.").⁷

⁶ Plaintiffs assert their claims under the Act against the City, presumably based upon agency principles. Consequently, the arguments in sub-sections B and C, if successful, require dismissal of Plaintiffs' claims under the Act against the City as well.

⁷ The Indiana Court of Appeals expressly adopted this position in *Baxter v. I.S.T.A. Insurance Trust*, 749 N.E.2d 47, 54 (Ind. Ct. App. 2001).

Additionally, a contractual promise is not a representation of fact necessary to support Plaintiffs' claim. *See, e.g., McKinney v. State*, 693 N.E.2d 65, 73 (Ind. 1998) ("A broken promise is not ipso facto a false representation."); *Anderson v. Indianapolis Ind. Aamco Dealers Adver. Pool*, 678 N.E.2d 832, 837 (Ind. Ct. App. 1997) ("Actual fraud may not be based on representations of future conduct, on broken promises, or on representations of existing intent that are not executed"), *trans. denied*.

Furthermore, the estimated bills Veolia sent did not misrepresent customer consumption because, by definition, these bills were not statements of the customer's consumption. Rather, they were what they purported to be: estimates of customer usage, a fact that is apparent on the face of every estimated bill Veolia sends.

In short, there was no misrepresentation. The Tariff sets forth the relevant terms of the Plaintiffs' contract with the City for the provision of water, including the frequency with which their meters will be read and the methodology for estimating their usage when their meters are not read. Veolia, pursuant to its obligations under the Management Agreement, sends Waterworks customers their bills. When these bills are based on estimated usage, this fact is stated on the face of the bill. If a customer believes that these bills violate the terms of the Tariff, he or she can utilize the dispute resolution procedure contained in the Tariff. But the customer cannot allege, as Plaintiffs have here, that Veolia made a misrepresentation and violated the Act. Veolia is entitled to summary judgment on Plaintiffs' claims under the Act.

C. Plaintiffs did not rely to their detriment on anything Veolia stated.

Plaintiffs do not allege and cannot prove any detrimental reliance, another prerequisite to asserting a claim under the Act.

First, greater clarity is needed regarding Plaintiffs' actual allegation of detrimental reliance. Plaintiffs contend they relied to their detriment on some unidentified misrepresentation

by paying their estimated water bills. (Complaint ¶ 50.) This overstates Plaintiffs' case. Plaintiffs receive a water bill after they have consumed the City's water. Thus, they cannot refuse to pay for the water actually consumed and are not damaged by paying water bills based upon their actual consumption. They also cannot be damaged by paying an estimated bill that charged them less than their actual consumption. Further, Plaintiffs cannot complain about a bi-monthly estimate that exceeds their actual consumption, because bi-monthly estimates are expressly contemplated in the Tariff. Thus, properly understood, detrimental reliance was theoretically possible only with respect to (1) bills they contend should not have been estimated; and (2) that portion of any wrongly-estimated bill that exceeded Plaintiffs' actual consumption.⁸

But Plaintiffs still did not pay this small class of alleged overcharges due to their reliance upon anything Veolia said. As stated above, Veolia informed Waterworks customers each time they received a bill based upon estimated usage. According to the Tariff's express terms, Plaintiffs were not compelled to pay any bill they believed exceeded their actual consumption. They could exercise their right of protest under the Tariff's dispute resolution procedure. Additionally, Plaintiffs' actual consumption was always available to them, upon request for an actual meter read. (Complaint, Exhibit B at Rule 3(C).) Plaintiffs cannot, as a matter of law, rely to their detriment on any estimated usage where the truth of the matter allegedly misrepresented – their consumption – was readily available to them. *See Craig v. ERA Mark Five Realtors*, 509 N.E.2d 1144, 1147-48 (Ind. Ct. App. 1987) (constructive fraud not established where truth of fact allegedly misrepresented available to plaintiff).

⁸ Even this overstates Plaintiffs' damages. As stated above, Plaintiffs correctly admit that any overcharges due to estimated usage that exceeded Plaintiffs' actual usage were eventually "credited back" to Plaintiffs. (Complaint ¶ 35.) Thus, their claimed damages are limited to the time value (i.e. interest) on the alleged overcharge for those bills based upon allegedly improper estimates from the time of the overcharge until it is credited back, a matter of months. *Id.* As the calculations on p. 4 n. 2 demonstrate, any single Plaintiff's damages will be nominal, even if an estimated bill is twice the actual consumption.

Because they cannot prove detrimental reliance, Plaintiffs cannot state a claim under the Act. Veolia is entitled to summary judgment on these claims.

IV. Plaintiffs' Unjust Enrichment Claim Against Veolia Fails Because Veolia Received No Benefit From Plaintiffs' Alleged Overpayment Of Their Water Bills, Estimated Or Otherwise.

A cause of action alleging “unjust enrichment” is often synonymous with restitution. *Wallem v. CLS Industries, Inc.*, 725 N.E.2d 880, 890 (Ind. Ct. App. 2000). *See also* Corbin On Contracts, § 1.20 at 63 (Revised ed. 1993) (“Unjust enrichment is occasionally used as a synonym for restitution; one sometimes hears of a ‘law of unjust enrichment.’ Its primary use, however, should be to state an ultimate fact: ‘because X was unjustly enriched, X must make restitution’” of the benefit conferred and which he purportedly unjustly retains.).


The inescapable and fundamental requirement to assert an “unjust enrichment” claim is that the plaintiff conferred a measurable benefit onto the defendant. *See, e.g., Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991), *cert. denied*, 502 U.S. 1094 (1992). This requirement does not exist in this case.

Again, Plaintiffs’ claimed damage is that they overpaid certain water bills. (Complaint ¶¶ 35, 57.) They contend Veolia “benefitted from the improperly inflated payments for water service,” *id.* at ¶ 58, and request the Court to order Veolia to disgorge this alleged benefit. The problem is: none of the consideration Veolia receives under the Management Agreement is affected by customers’ overpayment of their water bills or any payment of late fees. (Baumes Aff. ¶ 7.) Thus, Veolia did not receive any benefit from Plaintiffs’ alleged overpayment of their water bills or payment of late fees. *Id.* ¶ 8. Plaintiffs, therefore, cannot establish the most fundamental element of their unjust enrichment claim – a benefit to Veolia from the allegedly wrongful conduct. Summary judgment should be entered in Veolia’s favor on this claim.

V. Conclusion

For each and all of the above reasons, summary judgment should be entered in favor of Veolia and against Plaintiffs on all issues raised in Plaintiffs' Second Amended Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record, by Federal Express, on this the 1st day of April, 2009:

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