

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:)
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Local Government Center, Inc., *et al.*)

) Case No: C-2011000036
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)

**RESPONDENT JOHN ANDREWS' MOTION TO DISMISS COUNT VI
OF THE AMENDED PETITION, CIVIL CONSPIRACY**

Respondent John Andrews, by and through his counsel, Orr & Reno, P.A., moves
to dismiss Count VI of the Amended Petition, civil conspiracy, as follows:

Introduction

On February 17, 2012, the Bureau of Securities Regulation ("BSR") filed its Amended Petition. Count VI of the Amended Petition sets forth a cause of action that does not appear in the original Staff Petition – civil conspiracy by the Individual Respondents. The civil conspiracy claim should be dismissed for three reasons.

First, the Department of State (the "Department") lacks subject matter jurisdiction to adjudicate a cause of action for civil conspiracy. The Department's jurisdiction in this proceeding is limited to adjudicating the BSR's claims of substantive violations of RSA Ch. 5-B and RSA Ch. 421-B. Its jurisdiction does not extend to a civil cause of action, particularly one in which damages is an essential element. Second, because the Individual Respondents are alleged to have acted in their official capacities on behalf of the same business entity, they are incapable of forming a civil conspiracy as a matter of law pursuant to the intra-corporate conspiracy doctrine. Third, the Amended Petition does not allege that the conspiracy injured the BSR, and damages to the petitioner is an essential element of a civil conspiracy claim.

Argument

I. The Department of State lacks jurisdiction to adjudicate a claim of civil conspiracy.

Unlike the superior courts, administrative agencies are granted only limited and special subject matter jurisdiction. *Appeal of Campaign for Ratepayer's Rights*, 2011 N.H. LEXIS 99, at *2 (July 21, 2011) (citing *Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327 (1999)). The agency's jurisdiction "is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself." *Id.* (internal citations and quotations omitted). Moreover, an agency "that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." *Id.* (internal citations and quotations omitted).

Civil conspiracy is a cause of action recognized at common law. *See Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987). A civil conspiracy is "a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Id.* The elements of the civil conspiracy cause of action are:

- (1) two or more persons (including corporations); (2) an object to be accomplished (i.e., an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means) . . . ;
- (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.

Id. Thus, civil conspiracy is a tort claim that includes damages as an essential element. *See Jay Edwards, Inc.*, 130 N.H. at 47; *Appeal of Armaganian*, 147 N.H. 158, 162 (2001) ("The gist of a civil action for conspiracy is not conspiracy as such, without more, but the damage caused by the acts committed pursuant to the formed conspiracy. There

must be something done pursuant to the conspiracy *which harms the plaintiff.*") (emphasis added); *Daniels v. Barker*, 89 N.H. 416, 422 (1938) ("The gist of an action . . . in the nature of conspiracy, is not the unlawful or wrongful agreement and combination of defendants, but their joint fraudulent acts, and the consequent damage resulting from the execution of the agreement. . . . The wrongs claimed to have been done to the plaintiff, and not conspiring to do them, are the foundation of the action, and the damage resulting from the unlawful acts must be alleged.") (internal citation omitted).

Here, Mr. Andrews does not dispute that alleged violations of RSA Ch. 5-B and RSA Ch. 421-B are justiciable in the proceeding. *See* RSA 5-B:4-a, I (Department has exclusive authority to "bring administrative actions to enforce *this chapter*") (emphasis added); RSA 421-B:21 (Department has exclusive authority to "bring administrative actions to enforce *the securities law*") (emphasis added). However, neither RSA Ch. 5-B nor RSA Ch. 421-B extends the Department's jurisdiction to civil conspiracy or other tort claims. Since the Department may not confer broader jurisdiction upon itself simply by asserting in this proceeding a claim that the legislature did not empower it to adjudicate, *see Appeal of Campaign for Ratepayer's Rights*, 2011 N.H. LEXIS 99, at *2 (July 21, 2011), Count VI, civil conspiracy, should be dismissed for lack of subject matter jurisdiction.

II. Count VI should be dismissed because individuals acting on behalf of an entity are incapable of forming a conspiracy as a matter of law.

In Count VI, the BSR alleges that "[t]he Individual Respondents conspired" to achieve a variety of "illegal" ends. According to the Amended Petition, the Individual Respondents are: Maura Carroll, the executive director of LGC Parent; John Andrews, the former executive director of LGC Parent and two of its predecessor entities; and

several current and former members of the board of directors of LGC Parent and one or more predecessor entities. Amended Petition, ¶¶13-21.

Count VI must be dismissed because, under the intra-corporate conspiracy doctrine, the Individual Respondents cannot constitute the “two or more persons” required to state a claim for civil conspiracy. *See Edwards*, 130 N.H. at 47 (a civil conspiracy requires “two or more persons”). “Under the intracorporate conspiracy doctrine, a corporation’s employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation.” *Dickerson v.*

Alachua County Commission, 200 F.3d 761, 767 (11th Cir. 2000); *Williams, et al. v.*

County of Nassau, 684 F.Supp.2d 268, 291-92 (E.D.N.Y. 2010) (“Under this doctrine, ‘the officers, agents and employees of single corporation or municipal entity, each acting within the scope of his or her employment, are legally incapable of conspiring with each other.’”) (*quoting Crews v. County of Nassau*, 2007 WL 4591325, at *12 (E.D.N.Y. 2007)). The foundation of the doctrine is that:

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire against itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952).

The facts alleged in the Amended Petition fall squarely within the intra-corporate conspiracy doctrine. The Amended Petition alleges that all of the Individual Respondents are or were directors, officers, agents, or employees of the same entity – LGC Parent and its predecessor entities. Amended Petition, ¶¶13-21. The Amended Petition names the Individual Respondents in their official capacities. *See* Amended Petition, ¶¶13-21. The

BSR does not allege that the Individual Respondents are or were “acting in their personal interests, wholly and separately from the [entity].” *See Crews*, 2007 WL at *12 (“[T]o show that defendants acted outside the scope of their employment, a plaintiff must show that defendants were acting in their personal interests, wholly and separately from the corporation or municipal entity.”) (internal quotations and citations omitted).

As such, the Amended Petition alleges the Individual Respondents’ conspiratorial conduct “derived solely from their positions within [LGC Parent] and the influence they wielded therefrom.” *See Rhodes v. Deere*, 1991 WL 352612, *3 (N.D.Ill.). Because the Individual Respondents are or were all agents of the same entity, and because they are not alleged to have acted in their personal interests, wholly apart from the entity, the intra-corporate conspiracy doctrine bars Count VI. *See Dickerson*, 200 F.3d at 767; *Williams, et al.*, 684 F.Supp.2d at 291-92; *Crews*, 2007 WL 4591325, at *12.

Courts in other jurisdictions have applied the intra-corporate conspiracy doctrine to dismiss a broad array of civil conspiracy claims. In each case, two or more employees, officers, directors or agents were alleged to be acting on behalf of the same entity. *See, e.g., Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (doctrine bars claim of conspiracy between landlord and landlord’s property manager); *Hermann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978) (doctrine bars claim of conspiracy between law school, its trustees, and certain employees); *Hull v. Cuyahoga Valley Joint Vocational School District Board of Education*, 926 F.2d 505, 509-10 (6th Cir. 1991) (doctrine bars claim of conspiracy between school board, superintendent, executive director, and school administrator); *Travis v. Gary Community Mental Health Care Center, Inc.*, 921 F.2d 108, 111 (7th Cir. 1990) (doctrine bars claim of conspiracy between corporation,

executive director of corporation, director of administration of corporation, and director of clinical services of corporation); *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66, 71 (2d Cir. 1976) (doctrine bars claim of conspiracy between cooperative apartment corporation and board of directors); *Doherty v. American Motors Corporation*, 728 F.2d 334, 340 (6th Cir. 1984) (doctrine bars claim of conspiracy between corporation, in-house counsel, and outside counsel); *J.P. Medgansis v. Bridgeport Roman Catholic Diocesan Corporation*, 1997 WL 219829 (Conn.Super.) (doctrine bars claim of conspiracy between diocesan corporation, two bishops, and a priest); *Crews*, 2007 WL 4591325, at *12 (doctrine bars claim of conspiracy between county, county police department, county commissioner, and various other county departments and employees); *Rhodes*, 1991 WL 352612, *3 (doctrine bars claim alleging civil conspiracy between school superintendent, school board, and school board members).

While the New Hampshire Supreme Court has not addressed the intra-corporate conspiracy doctrine, New Hampshire courts have recognized the unity of intra-corporate actors in other contexts. *See, e.g., In re New Hampshire Disabilities Rights Center, Inc.*, 130 N.H. 328, 334 (1988) (“when a corporation’s employees, acting within the scope of their authority, provide legal services to the corporation’s clients or customers, the corporation practices law”); *see also Sutton Mutual Insurance Company v. Notre Dame Arena, Inc.*, 108 N.H. 437, 441 (1968) (“a corporation can act only through its officers, agents and employees . . .”). Accordingly, the overwhelming weight of authority in support of the intra-corporate conspiracy doctrine and the recognition in New Hampshire that the acts of the agent are the acts of the corporation, render it likely that the New

Hampshire Supreme Court will adopt the intra-corporate conspiracy doctrine when presented the opportunity.

Dismissal for failure to state a claim is warranted when “the facts pled cannot constitute a basis for legal relief.” *Buckingham v. R.J. Reynolds Tobacco Co.*, 142 N.H. 822, 825 (1998). Since the intra-corporate conspiracy doctrine bars relief against the Individual Respondents for civil conspiracy, Count VI should be dismissed for failing to state a claim upon which relief can be granted.

III. Count VI should be dismissed because the BSR fails to allege that the civil conspiracy caused injury to the BSR.

“The gist of a civil action for conspiracy is not conspiracy as such, without more, but the damage caused by the acts committed pursuant to the formed conspiracy. There must be something done pursuant to the conspiracy *which harms the plaintiff.*” *Appeal of Armaganian*, 147 N.H. at 162 (emphasis added). Damages proximately caused by the conspiracy are an essential element of the civil conspiracy cause of action. *See Id.* (citing *Jay Edwards, Inc.*, 130 N.H. at 41).

Viewed in the light most favorable to the BSR, Count VI can be read to allege that the persons harmed by the conspiracy are the current and past participants in the 5-B Pools, and the 5-B Pools themselves. The Amended Petition does not allege that the conspiracy injured the BSR, the petitioner in this enforcement proceeding. Because Count VI does not allege that the petitioner in this proceeding suffered damages as a result of the alleged civil conspiracy, Count VI fails to state a claim upon which relief can be granted, and must be dismissed. *See Appeal of Armaganian*, 147 N.H. at 162; *see also Buckingham*, 142 N.H. at 825 (Dismissal for failure to state a claim is warranted when “the facts pled cannot constitute a basis for legal relief.”)

The passing reference in Count VI to a conspiratorial effort to disguise certain acts from “the public,” Amended Petition, ¶133, does not satisfy the damages element of civil conspiracy. Particularly in the context of allegations that repeatedly assert harm to the Members of the RSA 5-B risk pools, it is not plausible to interpret this isolated reference as an allegation that the conspiracy injured the public as a whole. In any event, to the extent BSR now may claim that it seeks to recover damages arising from the alleged conspiracy on behalf of the public, the Amended Petition fails to meet the heightened pleading standard that applies to causes of action brought by the State on behalf of the public.

To have *parens patriae* standing, “[f]irst, the state must assert an injury to a ‘quasi sovereign’ interest, an interest apart from the interests of particular private parties. Second, the state must allege injury to a ‘substantial segment’ of its population.” *State v. City of Dover*, 153 N.H. 181, 186 (2006). “Mere enforcement of an agency’s organic statute is not a *parens patriae* suit . . . a state must affirmatively assert *parens patriae* status.” *Sierra Club v. Two Elk Generation Partners, L.P.*, 646 F.3d 1258, 1274 (10th Cir. 2011) (citing *U.S. v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 986-87 (2d Cir. 1984) for the proposition that “an entity suing as *parens patriae* must actually purport to act in such a capacity.”) (Lucero, J., dissenting). Count VI does not allege injury to a “substantial segment” of the population of the State, and the isolated reference in Count VI to “the public” does not satisfy the *parens patriae* pleading standard.¹

¹ Even had the BSR pled *parens patriae* standing, the BSR is an administrative agency and, unlike the Attorney General’s Office, lacks authority, absent specific statutory authorization, to bring lawsuits on behalf of the State and its people. Compare *Attorney General by G. Wells Anderson v. Rochester Trust Company*, 115 N.H. 74, 76 (1975) (recognizing the Attorney General’s broad common law powers, including the power to enforce the public good) with *Appeal of Campaign for Ratepayer’s Rights*, 2011 N.H. LEXIS 99, at *2 (July 21, 2011) (Administrative agencies are granted only limited and special subject matter jurisdiction).

For the foregoing reasons, BSR cannot meet the damages element of a civil conspiracy claim. Dismissal for failure to state a claim is warranted when “the facts pled cannot constitute a basis for legal relief.” *Buckingham*, 142 N.H. at 825. Count VI, civil conspiracy should be denied for failure to state a cause of action upon which legal relief can be afforded.

Prayer for Relief

Respondent John Andrews respectfully requests that the Presiding Officer dismiss Count VI of the Amended Petition, civil conspiracy.

Respectfully submitted,

John Andrews

March 12, 2012

By: 
Michael D. Ramsdell, Esq. (Bar No. 2096)
Joshua M. Pantesco (NH Bar # 18887)
ORR & RENO, P.A.
One Eagle Square, P.O. Box 3550
Concord, NH 03302-3550
(603) 223-9185
mramsdell@orr-reno.com
jpantesco@orr-reno.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day via electronic mail to all counsel of record.


Michael D. Ramsdell, Esq.

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