STEIN v. KINSTON CHARTER ACADEMY

16 CVS 5628

SUPERIOR COURT OF NORTH CAROLINA, WAKE COUNTY

March 16, 2018

Reporter
2018 NC Sup. Ct. Motions LEXIS 447 *

JOSHUA H. STEIN, Attorney General, Plaintiff, v. KINSTON CHARTER ACADEMY, a North Carolina non-profit corporation; OZIE L. HALL, JR., individually and as Chief Executive Officer of Kinston Charter Academy; and DEMYRA MCDONALD-HALL, as Board Chair of Kinston Charter Academy, Defendants.

Type: Motion

Counsel

STATE OF NORTH CAROLINA, ex rel., JOSHUA H. STEIN, ATTORNEY GENERAL, MATTHEW L. LILES, State Bar No. 38315, Assistant Attorney General, North Carolina Department of Justice, Attorney for Plaintiff , Raleigh, NC.

Title

STATE'S BRIEF IN OPPOSITION TO DEFENDANT HALL'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND THE CORPORATE DEFENDANTS' MOTION TO DISMISS

Text

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I. INTRODUCTION

Defendant Ozie Hall ("defendant Hall") has moved this Court to dismiss the State's claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and the remaining defendants ("Corporate Defendants") have moved to dismiss the State's claims pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6). In essence, some 20 months after filing their answer in this matter, and 10 months after filing motions to dismiss, defendants are back for a second bite at the apple, with new arguments for the dismissal of the claims against them. As the arguments in support of their motions turn on overruled precedents and novel and unsupported legal theories, they are ripe for denial and the State's claims should proceed to trial.

II. STATEMENT OF PROCEDURAL FACTS

The State filed this action on April 26, 2016. All defendants jointly answered the complaint on June 26, 2016, after requesting and receiving an extension to do so. On the suggestion of defendant's counsel, **[*2]** the State agreed to filing a Consent Motion to Designate Case Exceptional and for the Appointment of a Special Judge Pursuant to Rule 2.1 of the General Rules of Practice on July 20, 2016, which was granted on July 28, 2016. Since that time, the parties have been engaged in discovery.

On May 26, 2017, some fourteen months after this action was originally initiated, defendant Hall filed his first motion to dismiss. On June 26, 2017, defendant Hall served his 68-page Memorandum in Support of Defendant's Motion to Dismiss, which argued, *inter alia,* that the State failed to state an actionable false claim because the claim made was not false and the North Carolina charter school law allowed defendants to request funds for up to a 20 percent increase without review by the State Board of Education. Hall Memorandum in Support at 21. On June 30, 2018, defendant McDonald-Hall filed a Support for Defendant Hall's Motion to Dismiss on behalf of herself and Kinston Charter Academy ("KCA") in which she moved for all claims to be dismissed. On July 3, 2017, the Court heard oral argument on the pending motions to dismiss with respect to defendants Hall and McDonald-Hall in their individual capacities. **[*3]**

On August 14, 2017, the Court issued its ruling dismissing certain claims, but preserving the State's North Carolina False Claims Act, N.C. Gen. Stat. §§ 1-605, *et seq.* claim against defendant Hall in his individual capacity. The Court also dismissed all claims against defendant McDonald-Hall in her individual capacity. On January 26, 2018, defendant Hall sought appeal of this decision to the North Carolina Court of Appeals, which was summarily denied on January 30, 2018.

On February 13, 2018, defendant Hall filed his pending motion to dismiss pursuant to Rule 12(b)(1). On March 9, 2018, Corporate Defendants also filed their motion to dismiss pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6). On March 9, 2018 and March 14, 2018 the State was served with memorandums of law in support of defendant Hall's and the Corporate Defendants' motions, respectively. The State was granted leave to file this response. All pending motions to dismiss have been put on for hearing on March 19, 2018. As such, the State hereby replies to both motions and their overlapping bases as follows.

III. STANDARD OF REVIEW

When evaluating a motion to dismiss, a court must consider **[*4]** "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat 7 Bank,* 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Motions to dismiss are used "to test the law of a claim, not the facts which support it." *Warren v. New Hanover County Bd. ofEduc.,* 104 N.C. App. 522, 525, 410 S.E.2d 232, 234 (1991) (citation omitted). For that reason, in considering a motion to dismiss under N.C.R. Civ. P., Rule 12(b)(6), "plaintiff's allegations are to be liberally construed and treated as true." *Alfred v. Capital Area Soccer League, Inc., 194 N.C. App. 280, 289, 669 S.E.2d 777, 782 (2008).* Dismissal is precluded under motions to dismiss "except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Warren, 104 N.C. App. at 525,410* S.E.2d at 234.

"Subject matter jurisdiction is the predicate to the exercise of any authority by the state courts. It is either conferred or withheld by state statute or the constitution." N.C. Civil Procedure § 12-4 (citations omitted). In considering a challenge to the court's subject matter jurisdiction under Rule 12(b)(1), the Court may consider matters outside of the pleadings. *Tart v. Walker, 38 N.C. App. 500, 502,248 S.E.2d 736, 737 (1978).*

IV. ARGUMENT

The crux of the State's claim under the North Carolina False Claims Act ("NCFCA"), N.C. Gen. Stat. §§ 1-605, *et seq.* is that when defendants made a claim for state funds for the 2013-14 school year, defendants had no reasonable basis to believe that KCA would survive, let alone expand its enrollment to 366 students. *See* Compl. ffi| 72-91, 116-122. Contrary to defendants' arguments, this Court **[*5]** has subject matter jurisdiction to hear this claim and the Attorney General has a specific statutory grant of standing to bring the claim. Furthermore, none of the Corporate Defendants' arguments provide a persuasive reason why this Court should not find that the Complaint states an actionable NCFCA claim, as it previously did with respect to defendant Hall. Finally, defendants' claims to various forms of sovereign immunity are speculative at best and do not present the type of insurmountable legal hurdle necessitating dismissal.

1. The State is Not Required to Specifically Plead that it Diligently Investigated its Claims to Confer Subject Matter Jurisdiction On the Court and in Any Effect It Plead Facts Supporting That Conclusion (Def. Hall's Argument 1/Corporate Defendant's Argument VI(a))

Defendant Hall's first argument for dismissal, and the Corporate Defendants' argument VI(a) is that this Court lacks subject matter jurisdiction because the State did not specifically plead that it had diligently investigated its claims. Defendants have not provided any controlling authority holding that such a pleading is a required condition precedent under the NCFCA or the analogous **[*6]** federal statute. Furthermore, the Complaint, as pled, exhibits the State's diligent investigation into this matter, as such this argument must fail.

a. Failure to Plead a Condition Precedent Does Not Warrant Dismissal

Defendant has not established that, as a matter of law, Rule 9(c) deprives this Court of subject matter jurisdiction if the Attorney General does not specifically plead that he diligently investigated his NCFCA case, in fact defendant Hall's primary authority compels the opposite conclusion.

In support of his argument, defendant Hall cites the Court of Appeals' decision in *Richland Run Homeowners Assoc, v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996)* for the proposition that "if a plaintiff does not aver compliance with a condition precedent, then the plaintiff's case is insufficient as a matter of law." Hall Memorandum of Law at 5. This is not good law. The N.C. Supreme Court ultimately overturned that decision, explicitly adopting the reasoning in the dissent. *Richland Run Homeowners Assoc, v. CHC Durham Corjo., 346 N.C. 170, 484 S.E.2d 527 (1997)*. Judge Greene, in that dissent, specifically stated the opposite of what defendants claim, namely that though plaintiffs have the burden of proving conditions precedent **[*7]** "I do not read Rule 9(c) as requiring *the pleading* of conditions precedent." *Richland Run, 123 N.C. App. at 353,473* S.E.2d at 654 (dissent) (emphasis in original). This conclusion is congruent with noted commentators on the North Carolina Rules of Civil Procedure who caution that "[c]ourts should be hesitant to enforce its provisions strictly." Bender on North Carolina Civil Procedure § 9-4.

b. Not a Condition Precedent

Defendant has cited no controlling authority that diligent investigation is a condition precedent that needs to be pled under the North Carolina False Claims Act or the federal analog. This alone is dispositive. *See Willowmere Cmty. Ass 'n v. City of Charlotte, 2018 N.C. LEXIS 66 (Mar. 2, 2018)* (finding nothing in its standing jurisprudence to requirement a corporate plaintiff to plead that it complied with its internal rules and bylaws in order to bring a suit)1. Furthermore, the plain language of the statute does not indicate it is a condition precedent that would need to be pled. The first sentence of *N.C. Gen. Stat. § 1-608* states that the Attorney General can bring an action if he "finds that a person has violated or is violating *G.S. 1-607*." The Complaint alleges that **[*8]** violation.

c. The Complaint Shows that the Attorney General Diligently Investigated His Claims

The facts pled in the Complaint show that the Attorney General diligently investigated the NCFCA allegations made therein. The Complaint and accompanying exhibits total 238 pages. As evidenced by the level of detail in the Complaint and the various exhibits, the State reviewed voluminous documents from the State Department of Public Instruction (Complaint at Ex. 1-18) and the Office of the State Auditor (Complaint at Ex. 19-29). Those documents included a 63-page audit of Kinston Charter Academy that included several recommendations from the State Auditor urging legal action against defendants to recover funds as well as a rebuttal from defendants. (Ex. 20) The State has plead sufficient facts for the Court to conclude that the Attorney General diligently investigated the False Claims Act claims alleged.

2. Defendants Have Not Shown How, as a Matter of Law, Their Claims of Sovereign Immunity Warrant Dismissal (Def. Hall's Argument 2,5/Corporate Def. Args IV-V, VIII(a))

Defendants claim that they are protected from liability by various iterations of sovereign **[*9]** immunity and that the State's pleading is defective because it failed to allege a waiver of this immunity. Defendants do not cite any definitive legal authority that charter schools are immune from the State's NCFCA claim, but merely suggest that because charter schools are part of the public school system that they are generally immune from suit. Given the tenuousness of defendants' claims for immunity, they have not shown the State's case faces the "insurmountable bar to recovery" necessary to warrant dismissal. *Warren, 104 N.C. App. at 525,410* S.E.2d at 234.

a. Defendants Have Not Shown That Charter Schools Enjoy Immunity For Violations of the NCFCA

Defendants claim that they are wholly-protected from liability by sovereign immunity, relying solely on precedent related to traditional public schools' and public school officials' immunity from tort and negligence claims. This is not persuasive on the narrow issue of whether North Carolina charter schools are immune from suit under the NCFCA. The North Carolina Court of Appeals has held that governmental immunity extends to tort claims, but not statutory claims. *Craig v. City ofAsheville Bd. of Education, 142 N.C. App. 518, 543 S.E.2d 186 (2001)*. As such, **[*10]** the Court should not dismiss the State's statutory NCFCA claim.

Though nominally deemed public schools, North Carolina law establishes charter schools as legally separate from the state and traditional public schools. *See N.C. Gen. Stat. § 115C-218(a)* (charter schools "operate independently of existing schools") *See also, N.C. Gen. Stat. § 115C-218.1(b)(12)* (referring to traditional schools as "public schools" as opposed to "charter schools"); § 115C-

218.45(a) (same); § 115C-218.45(c) (same); § 115C-218.45(i)(same). Charter schools are run by private, non-profit corporations. N.C. Gen. Stat. § 115C-218.15(b). The debts of the corporation that runs a charter school are not state debts and will not be satisfied directly from the state treasury. N.C. Gen. Stat. § 115C-218.105(b) ("No indebtedness of any kind incurred or created by the charter school shall constitute an indebtedness of the State or its political subdivisions, and no indebtedness of the charter school shall involve or be secured by the faith, credit, or taxing power of the State or its political subdivisions.") Similarly, the acts or omissions of charter schools cannot create legal liability for the State Board of **[*11]** Education. N.C. Gen. Stat. § 115C-218.20(b).

When presented with this exact issue, the California Supreme Court found that charter schools in that state did not have sovereign immunity from suit under its state false claims act or state equivalent to Chapter 75. *See Wells v. One20one* Learning Foundation, 39 Cal. 4th 1164, 141 P.3d 225 (2006). In that case, students sued traditional public schools and the operators of public charter schools. *Id.* The *Wells* Court found that the charter schools and their operators were not covered by sovereign immunity even though traditional public schools were. *Id. at 1197,1200-01, 141 P.3d at 241, 243-44*. In that case, the charter schools argued, as defendants do, that since California's charter school law defined charter schools as public schools under the state constitution and subject to the jurisdiction of the public school system they should be afforded sovereign immunity. *Id. at 1199, 141 P.3d at 242*. The California Supreme Court disagreed, finding that "[t]hough, by statutory mandate, these institutions are an alternative form of public schools financed by public education funds, they and their operators are largely free and independent of management and oversight by the public education bureaucracy." *Id. at 1203, 141 P.3d at 245*. In noting that the "application **[*12]** of the [California False Claims Act] to the charter school operators in this case cannot be said to infringe the exercise of the sovereign power over public education" the *Wells* court found particularly dispositive that, as in North Carolina, no judgment against the charter school operators would be paid from the state treasury. *Id. at 1201-02,141P*.3dat244.

Similarly, the U.S. Supreme Court has found that certain local government entities are not immune from federal false claims act suits. *See Cook County v. United States ex rel. Chandler, 538 U.S. 119, 133-34, 155 L. Ed. 2d 247, 259-60 (2003)* (noting in finding local governments are covered by the federal false claims act that if Congress had wanted to exempt local governments it would have explicitly done so). Federal courts have also found that some public-private entities that perform government functions do not enjoy sovereign immunity from federal false claims cases. *See, e.g., United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency, 804 F.3d 646, 677 (4th Cir. 2015)* (finding that the Pennsylvania Higher Educational Assistance Authority, a public corporation, did not enjoy sovereign immunity from a false claims act case). Finally, a federal court has found that while charter schools are public schools in North **[*13]** Carolina that alone does not necessarily entitle the members of the board of directors of the non-profit corporation that runs the charter school to Eleventh Amendment immunity as state officials acting in their official capacities. *Peltier v. Charter Day Sch. Inc., 2017 U.S. Dist. LEXIS 47253, *12 (E.D.N.C. Mar. 30, 2017)*. Defendants' unsupported claims of immunity from the State's claims do not warrant dismissal.

b. Defendant Hall2 Does Not Have Public Official Immunity

In the first instance, should the Court decide that charter schools do not have sovereign immunity from the State's claims, then defendants Hall and McDonald-Hall cannot possess public official immunity, which is a derivative form of immunity. But even, assuming *arguendo,* that Kinston Charter Academy, the non-profit corporation, has some sovereign immunity, defendant Hall does not have public official immunity.

"It is well established that [p]ublic officers are shielded from liability unless their actions are corrupt or maliciousf;] however, public employees can be held personally liable for mere negligence. In distinguishing between a public official and a public employee, our courts have held that (1) a public office is a position created by the **[*14]** constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. Additionally, an officer is generally required to take an oath of office while an agent or employee is not required to do so." *Murray v. County of Person, 191 N.C. App. 575, 579-80, 664 S.E.2d 58, 61 (2008)* (internal quotations and citations omitted), *disc. rev. denied, 363 N.C. 129, 673 S.E.2d 360 (2009)*. "The mere fact that a person charged with negligence is an employee

of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner." *Miller v. Jones, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945)*.

The Chief Executive Officer of a charter school is not a public official for purposes of immunity. The position is not required to exist. It was not created by statute or the state constitution, but rather by a private non-profit corporation. The position's duties are not laid out by statute. Furthermore, there is no indication that the CEO took any proscribed oath of office.

Even assuming, *arguendo,* that defendant Hall is a public official, **[*15]** he is not immune from the State's claims because the actions alleged in the Complaint were malicious, corrupt, or not within the scope of defendant's official authority. *See Fullwood v. Barnes, N.C. App. , , 792 S.E.2d 545, 550 (2016)* ("Actions that are malicious, corrupt, or outside of the scope of official duties will pierce the cloak of official immunity.") (citation omitted). The Complaint alleges that defendant Hall knowingly submitted a false claim for payment of state funds in violation of state law and his duties as an officer of a non-profit corporation. *See, e.g.,* Complaint H 73 ("Defendants unreasonably overstated their anticipated enrollment to get a temporary infusion of cash."); [78-81 (listing reasons why defendant's estimate was not reasonably supported by fact); 185 (noting that defendant's request was exactly why DPI gave KCA the amount of money it did); 184 (noting that "defendants knew or should have known, that their enrollment projections were unattainable"); *see also* |f 86-91 (stating the reasons why defendants knew or should have known that KCA would run out of money and fail). The Complaint pleads that these acts were done knowingly, making them malicious. *See e.g.,* Complaint PP **[*16]** 1, 3, 72, 91, 105, 118; *Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984)* ("A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.") It is not within the scope of defendant Hall's duties as CEO to break the law and his duties to the corporation. As such, he is does not have immunity for those actions.

3. The NCFCA's **Statute** of **Limitations Does Not Compel Dismissal Under Rule 12(b)(1) (Def. Hall's Argument 3)**

The Court should deny defendant's third argument for dismissal because the limitation on actions in N.C. Gen. Stat. § l-615(a) is plainly not a statute of repose. Defendant's own primary authority does not support his argument.

"A statute of limitation is a procedural bar which limits the time within which a plaintiff may commence an action after the cause of action has accrued" that is most properly raised as an affirmative defense. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 117,446 S.E.2d 603,604 (1994)*. The Court has already rejected defendant Hall's assertion in his previous motion to dismiss that the State's NCFCA claims are barred by the statute of limitations. Conversely, **[*17]** a statute of repose is a condition precedent that "begins to run at a time unrelated to the traditional accrual of a cause of action." *Id.* According to the North Carolina Supreme Court, "the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985)*.

N.C. Gen. Stat. § 1-615(a) is a statute of limitations because it is based on the time of the injury or the discovery of the injury. Section l-615(a)(i) provides that an action must be filed within six years of "the violation of *G.S. 1-607*." And the discovery rule in Section l-615(a)(ii) is clearly premised on the discovery of "facts material to the right of action" and given an outer limit of 10 years from "the date on which the violation is committed." In *Tipton,* this Court observed that a statute of limitation "runs from the time of an injury or the discovery of the injury." *Tipton at 117,446 S.E.2d at 604*. Without a violation of the North Carolina False Claims Act, the period in Section 1-615(a) does not start to run, as such that period is a statute of limitation not of repose.

By contrast, statutory period at issue **[*18]** in *Tipton* was unrelated to the accrual of a cause of action. Instead, as this Court noted, *N.C. Gen. Stat. § 44A-28(b)* outlined that the one-year period for an action on a payment bond was keyed to two specific events unrelated to the accrual of a cause of action - the last day on which the labor was performed or material furnished or the date of final settlement with the contractor. This period would begin to

run for every payment bond issued, regardless of the accrual of any action.

For the forgoing - in addition to the question as to whether Rule 9(c) warrants dismissal if

conditions precedent are not explicitly pled as explained in Section 1 - the Court should deny

defendant Hall's third argument.

4. The Attorney General Has Statutory Authority Granting Him Standing to Pursue His False Claims Act Claims (Def. Hall's 4th Argument, Corp. Defs. Argument VI (e))

Defendants' attempts to defeat the Attorney General's standing as dependent on a recognized interest in challenging charter school enrollments confuse the issue and do not warrant dismissal. The Attorney General has standing under a clear statutory grant to pursue violations of the NCFCA. As such, **[*19]** the Court should deny this basis for dismissal.

"Standing is a requirement that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action." *In re Baby Boy Scearce, 81 N.C. App. 531, 541, 345 S.E.2d 404,410 (1986)*. The Attorney General has standing to pursue any violation of the NCFCA pursuant to a specific statutory grant in *N.C. Gen. Stat. § 1-608(a)*. The statute specifically empowers the Attorney General to "bring a civil action" when he finds that someone has submitted or caused to be submitted a false claim for state funds in violation of *N.C. Gen. Stat. § 1 -607*. This statutory authority is unqualified.

Defendants' arguments that the NCFCA requires some kind of predicate violation of another statute are unsupported by the text of the Act, which clearly states that a claim merely needs to be "false or fraudulent." *N.C. Gen. Stat. § 1-607*. As other courts have noted, the federal act that the NCFCA is patterned after "covers all fraudulent attempts to cause the government to pay out sums of money." *United States ex rel. Loughren v. Unum Group, 613 F.3d 300,305-06 (1st Cir. 2010)* (citation omitted). This includes estimates which can be false or fraudulent and thus legally actionable under the NCFCA.

The Fourth **[*20]** Circuit has found that unreasonable estimates are potentially actionable under the federal False Claims Act when those estimates are made by people without adequate facts to support them. *See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792-93 (4th Cir. 1999)* (holding that defendants could be held liable for unreasonably low cost estimates submitted solely to get the contract). The Court in *Harrison* found that estimates must be somewhat rooted in fact, saying an "estimate carries with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it." *Id. at 792*.

Other courts have found similarly. In *United States v. United Techs. Corp., 255 F. Supp. 2d 779 (S.D. Ohio 2003)*, a federal court rejected defendant's argument that certain best estimates could not be false under the federal False Claims Act. The Court found those estimates were actionable, where the government had asserted "both that [defendant] knew of no facts to substantiate its 'best estimate' and that it actually knew of facts that would preclude such an opinion." *Id., 255 F. Supp. 2d at 783*. The Complaint here similarly states a case that in the Spring of 2013, defendant had no reasonable **[*21]** basis to justify requesting funding for an amount of students he had no reason to believe would enroll at a school that was likely to fail. *See* Compl. fflf 78-81 (stating reasons why a reasonable person would not believe that KCA could get 366 students). These estimates are actionable irrespective of whether they were submitted in accordance with the legal framework of the programs they were related to or violated other laws. This Court should reject defendants' attempt to retread previously-rejected arguments that compliance with the Charter School Act somehow created a safe harbor for them to make false statements that would otherwise violate the NCFCA.

5. Public Policy Does Not Serve As a Basis For Dismissal (Def. Hall's 5tb Argument) Defendant Hall's fifth argument does not state a valid basis for dismissal under Rule

12(b)(1). Defendant's fifth argument makes several broad policy statements about charter schools and vague insinuations about the Attorney General and his motives. But what defendant's fifth argument does not explain is how this Court does not have subject matter jurisdiction to hear a NCFCA claim against him. As such, the Court should disregard defendant's **[*22]** Fifth Argument.

6. Corporate Defendants' Argument VI Does Not Compel Dismissal of the State's False Claims

Act Case.

Corporate Defendants' largely reiterate the same reasoning for dismissing the State's NCFCA claims that this Court rejected in defendant Hall's first motion to dismiss. The same reasoning that supported the Court's earlier decision compels a similar result here, insofar as the Complaint alleges a set of facts that allows for the inference that defendant Hall was acting in his official capacity or as an agent of KCA when the false claims were made. *See, e.g.,* Complaint P 6 (Def. Hall was CEO of Kinston Charter Academy), P 106 (all acts "were committed by defendants themselves, or their actual or apparent agents or assigns operating with defendants' authority and/or at defendants' direction"). As such, the Court should reject this basis for dismissal.

The NCFCA penalizes a person who "knowingly presents or causes to be presented a false or fraudulent claim for payment or approval." N.C. Gen. Stat. § l-607(a)(1). The NCFCA defines "knowingly" to not only include actual knowledge but also "deliberate ignorance" or "reckless disregard of the falsity **[*23]** of the information. *N.C. Gen. Stat. § 1-606(4)*: Under the federal False Claims Act, courts have explained that the reckless disregard standard was "designed to address the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered." *United States ex rel. Ervin & Assocs. v. Hamilton Sec. Group, 370 F. Supp. 2d 18, 42 (D.D.C. 2005)* (citing *Crane Helicopter Servs., Inc. v. United States,* 45 Fed. CI. 410,433 (Fed. CI. 1999)). Specific intent is therefore not required for false claims liability; as federal courts have concluded, "the statute covers not just those who set out to defraud the government, but also those who ignore obvious warning signs." *Crane,* 45 Fed. CI. at 433.

The State's Complaint makes a claim that defendants either purposefully made a statement to get state money with no reasonable support for the assertion, or at minimum they ignored the obvious warning signs that KCA would fail, not reach 366 students, or both. *See, e.g., P* 73 ("Defendants unreasonably overstated their anticipated enrollment to get a temporary infusion of cash."); fflj 78-81 (listing reasons why defendants' estimate was not reasonably supported by fact); 185 (noting that defendants' request was exactly why DPI gave KCA the amount of money it did); .J 84 (noting that "defendants knew or should have known, that their enrollment projections were unattainable"); *see also* PP 86-91 (stating the reasons why defendants knew or should have known that KCA would run **[*24]** out of money and fail). Defendants' motion fails to show how, if allowed to complete discovery, there is no set of facts that the State could develop to support this claim.

Counter to defendant's argument, estimates can be legally actionable under the NCFCA. The Fourth Circuit has found that unreasonable estimates are potentially actionable under the federal False Claims Act when those estimates are made by people without adequate facts to support them. *See Harrison, 176 F.3d at 792-93* (holding that defendants could be held liable for unreasonably low cost estimates submitted solely to get the contract); *see also, United Techs. Corp., 255 F. Supp. 2d at 783* (best estimates actionable if not supported). The Court in *Harrison* found that estimates must be somewhat rooted in fact, saying an "estimate carries with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it." *Id. at 792*. The State's Complaint here states a case that in the Spring of 2013, defendant had no reasonable basis to justify requesting funding for an amount of students he had no reason to believe would enroll at a **[*25]** school that was likely to fail. *See* Compl. Hf 78-81 (stating reasons why a reasonable person would not believe that KCA could get 366 students).

7. Corporate Defendants' Argument VII Does Not Compel Dismissal of the State's Nonprofit Claims

Defendants have not met their burden of showing that the State's Second Claim for Relief should be dismissed as a matter of law. Defendants' contention that the Attorney General's enforcement role is limited to dissolving nonprofit corporations, the Attorney General has standing and authority to enforce all aspects of the law governing nonprofits. Both statute and common law grant the North Carolina Attorney General broad powers to review and challenge the actions of corporations - nonprofit or otherwise - and the people who run them. *See* N.C. Gen. Stat. Chapters 55A; 75; and 114-1.1 (acknowledging the common law powers of the attorney general). The Attorney General is empowered to investigate all "corporations or persons in North Carolina doing business in violation of law" and to "prosecute civil actions against them if he discovers they are liable and should be prosecuted." *N.C. Gen. Stat. § 75-9*.

In addition, Chapter **[*26]** 55A gives the Attorney General additional responsibilities with respect to non-profits. For example, § 55A-12-02(g) directs the Attorney General to review asset transfers by non-profits to police self-dealing similar to what is alleged here. That provision however does not explicitly say what would happen should a corporation go through with a transaction disapproved by the Attorney General. Chapter 55A does not need to explicitly state what is plainly set out in Chapter 75-9, namely that the Attorney General has the power to prosecute criminal and civil actions against those who violate the law. In this case, it is even more obvious because N.C. Gen. Stat. § 55A-3-4 specifically notes that the Attorney General can bring an action to challenge corporate acts. *See* Morris v. Thomas, 161 N.C. App. 680, 685,589 S.E.2d 419, 422 (2003) (noting that "the Attorney General has authority to bring an action to restrain a nonprofit corporation from taking *ultra vires* or otherwise unlawful actions."). Illegal acts are by definition, *ultra vires*. *See* N.C. Gen. Stat. § 55A-3-01(a) (allowing nonprofit corporations to only be incorporated for "any lawful activity"); KCA Charter attached to Compl. as Exh. 2 at 2-3 (requiring charter schools to **[*27]** operate in accordance with "all other applicable laws and regulations").

Defendants' reading would limit all actions by the Attorney General under 55A to only those for dissolution of the corporation. This not only distorts the broad grant of authority to the Attorney General to confront abuses of power under North Carolina law, but makes the statute unworkable.

8. Corporate Defendants' Argument VIII Does Not Compel Dismissal of the State's Unfair and Deceptive Trade Practices Act Claims

The Complaint alleges that defendants solicited students to enroll in a school they knew would fail. During defendants' advertising campaign, they deceived students by failing to disclose the high likelihood that KCA would fail very soon. Defendants have not shown how the State's Complaint fails to allege an actionable violation or established that they are exempt from the Unfair and Deceptive Trade Practices Act ("UDPTA").

To plead a UDTPA claim, the Attorney General must allege that defendant: (1) committed an unfair or deceptive act or practice; (2) in or affecting commerce. N.C. Gen. Stat. § 75-1.1; *See* First Atl. Mgmt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998) (stating the 3-pronged **[*28]** test for private litigants); Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 211, 262 S.E.2d 860, 863 (Attorney General need not prove actual injury), *cert, denied, 300 N.C. 198,269 S.E.2d 624 (1980).* A practice or act "is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Even a truthful statement can be deceptive, if it has the capacity or tendency to deceive the average consumer. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 265,266 S.E.2d 610, 622 (1980). Contrary to defendants' argument, the State need not plead that defendants actions were the proximate cause of damages, because the Attorney General need not show actual deception or actual injury to recover on a UDTPA claim. *See* Mayton, 45 N.C. App. at 211, 262 S.E.2d at 863; Marshall, 302 N.C. at 548, 276 S.E.2d at 403; N.C. Gen. Stat. §§ 75-14,75-15.2.

a. The State Alleges Deceptive Advertising

The State alleges in its Complaint that defendants "engaged in an advertising campaign to convince students to enroll in KCA." Compl. P 38. The State further alleges that "defendants failed to fully disclose KCA's financial struggles to potential students before they enrolled." Compl. 108. Finally, even though the State need not prove actual deception to prevail on a UDTPA claim, the State alleged that concealing KCA's financial problems from potential enrollees **[*29]** could have deceived students into enrolling at a school where they might not have enrolled had they been given full information. Compl. P 110.

b. Defendants' Deceptive Advertising Was "In or Affecting Commerce" Defendants' unfair and deceptive acts were in or affecting commerce. The General Assembly has instructed that "'commerce' includes all business activities, however denominated." N.C. Gen. Stat. § 75-1.1(b). As noted by the North Carolina Supreme Court more than once, "this statutory definition of commerce is expansive." *HAJMM Co. v. House ofRaeford* Farms, Inc., 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991); *see also* Bhatti v. BucUand, 328 N.C. 240, 245, 400 S.E.2d440,443 (1991) ("[tjheterm 'business' generally imports a broad definition") (citation omitted). The North Carolina Supreme Court defines "business activities" thus: "a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such

as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM, 328 N.C. at 594, 403 S.E.2d at 493*.

The Complaint alleges that KCA was soliciting students to convince them to enroll there. State and local governments paid KCA thousands of dollars per **[*30]** student to educate the children. This was defendants' regular business. If defendants enrolled fewer students, they would receive less money. The fact that the money paid to KCA came from government sources, rather than the students themselves, does not relieve defendant of liability under the UDTPA. Defendants have not pointed to any authority supporting limiting the UDTPA in that way.

Finally, for the reasons that defendants as a private non-profit corporation should not be considered a state entity for sovereign immunity purposes explained in Section 2 above also compel the similar conclusion that defendants do not qualify as an UDTPA-exempt state agency. The burden of showing that they are exempt from the UDTPA is on the defendants. *N.C. Gen. Stat. § 75-1.1(d)*. Defendants have not carried this burden.

V. CONCLUSION

Finally, to the extent that the State has not specifically addressed herein other arguments made by defendants in their motions to dismiss or respective memorandums of law those arguments are wholly without merit and do not warrant dismissal of the State's Complaint. The State can and will respond to any of these additional arguments, if **[*31]** necessary, during oral argument or in supplemental briefing, if ordered. For the aforementioned reasons, and incorporating any additional arguments made by the State at oral argument, the State respectfully requests that the Court deny defendant's Motion to Dismiss.

Respectfully submitted this the 16th day of March, 2018.

STATE OF NORTH CAROLINA, ex rel.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached ***State's Brief In Opposition To Defendant Hall's Motion To Dismiss For Lack Of Subject Matter Jurisdiction And The Corporate Defendants' Motion To Dismiss*** on.all of the parties to this cause by:

__ Hand delivering a copy hereof to the attorney for each said party addressed as follows:

__ Depositing a copy hereof, postage prepaid, in the **[*32]** United States Mail, addressed to the attorney for each said party as follows;

__ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

__ Telecopying a copy hereof to the attorney for each said party as follows:

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This the 16th day of March, 2018.

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1 In both memorandums of law, defendants cite to the Court of Appeals' decision in this case, which was subsequently reversed on March 2, 2018 by the North Carolina Supreme Court. To the extent that defendants rely on that now-reversed decision for the premise that Rule 9(c) compels dismissal when certain conditions **[*33]** precedent are not explicitly pled, the Supreme Court's decision directly disagrees.

2 Since public official immunity only applies to officials sued in their individual capacity and the Court has dismissed the individual capacity claims against defendant McDonald-Hall, the question of whether or not she has public official immunity is of no moment. The State does not waive any right to contest this dismissal at a later date.

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