NORTH CAROLINA ex rel. STEIN

16 CVS 5628

SUPERIOR COURT OF NORTH CAROLINA, WAKE COUNTY

June 29, 2017

Reporter
2017 NC Sup. Ct. Motions LEXIS 97 *

STATE OF NORTH CAROLINA, ex rel. JOSH 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, individually and as Board Chair of Kinston Charter Academy, Defendants.

Type: Motion

Counsel

STATE OF NORTH CAROLINA, ex rel., JOSH 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'S MOTION TO DISMISS

Text

STATE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS [*1]

I. INTRODUCTION

Some fourteen months after the State initiated this action, while the parties are in the midst of conducting significant discovery, Defendant Hall ("defendant") has moved this Court to dismiss the State's claims as a matter of law. In his Memorandum in Support of Defendant's Motion to Dismiss, defendant makes numerous factual arguments outside of the Complaint, which are improper on a motion to dismiss. This belies the fact that most, if not all, of defendant's arguments are better left for consideration on motion for summary judgment. For the reasons herein, defendant has failed to carry his heavy burden of showing that the State's Complaint is so flawed that there is no set of facts that could support the State's claims. The Court should deny defendant's Motion to Dismiss and allow the parties to complete discovery.

The State provides the following arguments supporting the denial of defendant's Motion to Dismiss.

II. STATEMENT OF PROCEDURAL FACTS

The State filed this action on April 26, 2016. All defendants - including Mr. Hall -jointly answered the **[*2]** complaint on June 26, 2016, after requesting and receiving an extension to do so. On the suggestion of defendant's counsel, 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, both parties have propounded and answered discovery in accordance with this Court's December 6, 2016 Case Management Order. On February 27, 2017, the parties participated in a hearing before this Court related to the production of certain documents by the North Carolina State Auditor's Office, a third party. Following that hearing, and at the Court's direction, the State, defendants, and the third party negotiated a draft protective order that has yet to be entered due to a pending disagreement between defendants and the State Auditor's Office. In March 2017, the parties filed a Joint Motion to Extend Certain Deadlines. The Court granted that motion extending fact discovery through September 30, 2017 and setting a briefing schedule for dispositive motions that ends on February 10, 2018. *See* Order on Motion to Extend, June 16, 2017.

On or around April 4, 2017, the State was informed that Attorney Hartzog was being replaced by Attorney Rascoe. In discussions with Ms. Hartzog and Ms. Rascoe, the State

was told that it was unclear if defendant Hall was proceeding *pro se*. On May 21, 2017, defendant emailed the State a draft version of his Motion to Dismiss. Defendant also sent multiple other communications asking the State to voluntarily dismiss its Complaint and issue a public apology. The State did not respond directly to defendant due to ethical concerns of communicating directly with a represented party under Rule 4.2 of the North Carolina Rules of Professional Conduct.

Instead the State asked Ms. Rascoe to clarify whether or not she represented defendant Hall. On or around May 26, 2017, Ms. Rascoe confirmed that Mr. Hall would be proceeding *pro se* and consented **[*3]** to the State directly contacting Mr. Hall about this matter. On June 2, 2017, the State directly communicated to defendant that it would oppose his Motion to Dismiss, which he had filed on May 26, 2017. On June 23, 2017, defendants' counsel moved to withdraw. On June 26, 2017, defendant served his 68-page Memorandum in Support of Defendant's Motion to Dismiss (hereinafter cited as "Def.'s Mem."), which includes several unauthenticated exhibits.

III. STANDARD OF REVIEW

When evaluating a motion to dismiss, a court must consider "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 'I 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)*. 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." *Allred 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 **[*4]** 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*. "In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the issue is not whether a claimant will prevail, but whether the claimant is entitled to offer evidence in support of the claim." *Washburn v. Yadkin Valley Bank & Trust Co., 190 N.C. App. 315, 325, 660 S.E.2d 577, 585 (2008), disc. rev. denied, 363 N.C. 139, 674 S.E.2d 422 (2009).*

IV. ARGUMENT

a. The State's North Carolina False Claims Act Claims Must Survive

The crux of the State's claim under the North Carolina False Claim 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. This claim is actionable by law and supported by facts in the Complaint, which could be further developed through discovery. Defendant's motion must fail.

i. The State's NCFCA Claims are Not Legally Precluded (Defs Arguments I-III)

Though he divides them into three overlapping arguments, defendant's Arguments I-III **[*5]** boil down to whether he can be held liable under the NCFCA for a statement made during the enrollment-planning process. *See, e.g.,* Def's Mem. at 22 (arguing without support that "it is not the intent of the Legislature that Defendants be subject to the N.C. False Claims Act"). Based on the plain text of the NCFCA, the facts pled in the Complaint, and instructive federal decisions, defendant's argument must fail.

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. § 1-607(a)(1)*. The NCFCA defines "knowingly" to not only include actual knowledge but also "deliberate ignorance" or "reckless disregard of the falsity 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 clearly makes a claim that

defendant either **[*6]** purposefully made a statement to get state money with no reasonable support for the assertion, or at minimum he 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."); PP 78-81 (listing reasons why defendant's estimate was not reasonably supported by fact); P 85 (noting that defendant's request was exactly why DPI gave KCA the amount of money it did); P 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 out of money and fail). Though he refutes the facts in the State's Complaint - which are given deference at this juncture - defendant's 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 Circuit1 has found that unreasonable estimates are potentially actionable under the federal False Claims **[*7]** 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. S.C. 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. 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 school that was likely to fail. *See* Compl. PP 78-81 (stating reasons why a reasonable person would not believe that KCA could get 366 students).

Defendant's citation to United States ex rel Laird v. Lockheed Martin, 491 F.3d 254 (5th Cir. Tex. 2007) is unhelpful. In that case, the statements were far more speculative than here, as the cost projections at issue did not directly impact how much money was paid under the contract. *See* Laird, 491 F.3d at 262 ("It is undisputed that these **[*8]** cost projections could not have affected (or potentially affected) Lockheed's award fee."). That is simply not the case here. As defendant admits, and more importantly as pled in the Complaint, defendant's questionable statement that they would have 366 students directly caused the State to pay KCA the amount it paid. Def s Mem. at 26. This not only renders *Laird* inapplicable on the facts, but shows the materiality of defendant's false statements in this case, which defendant also wrongly disputes.

In his Argument II, defendant conflates what the Legislature deems an immaterial change to a charter agreement with materiality under the NCFCA. While N.C. Gen. Stat. § 115C-218.8 labels any expansion of enrollment an "immaterial" revision to KCA's charter for purposes of the North Carolina Charter School's Act, it does not render defendant's factually unsupportable statement that KCA would expand its enrollment by 20 percent immaterial for purposes of the NCFCA. Materiality, in the NCFCA, means something quite different. As the Court in *Harrison* noted, materiality is a judge-made requirement that "depends on whether the false statement has a natural tendency to influence agency action **[*9]** or is capable of influencing agency action." Harrison, 176 F.3d at 785 (citations omitted); *see also* N.C. Gen. Stat. § 1-606(5). The question of materiality is a mixed question of law and fact. *Id.* Defendant has actually conceded that his statements in question. were material. Defendant notes that the statement in question directly influenced the amount of funds the State paid to KCA. Def s Mem. at 26 (noting that had defendant made not statement at all, the state would have provided funding for only 305 students). If nothing else, defendant's statement was material in that it caused the State to expend money for 61 more students than it would have had defendant not confirmed they wanted the maximum amount allowed under law.

Defendant has not shown how the State's NCFCA claims face "an insurmountable bar to recovery." Warren, 104 N.C. App. at 525, 410 S.E.2d at 234. Based on the allegations in the Complaint and the plausible legal theories described above, the State deserves the right to finish discovery and argue for the Court to adopt those legal theories.

ii. The State's NCFCA Claim is Not Precluded by the Statute of Limitations

The State's NCFCA claim is not barred by **[*10]** the statute of limitations, contrary to defendant's allegations in his Argument IV. Under the NCFCA, the time for

bringing an action runs from "the date when facts material to the right of action are known or reasonably should have been known by the official of the State of North Carolina charged with responsibility to act in the circumstances". N.C. Gen. Stat. § 1-615(a). The State alleges that defendant did not disclose material facts that threatened KCA's continued existence. *See, e.g.,* Compl. PP 33, 36 (alleging defendants did not inform DPI of the bridge loans)2 If taken as true, the Complaint pleads a case whereby the true impossibility of defendants' situation and thus the falsity of defendants' statements were not evident to DPI at the time they were made. Defendant has not shown how, based on the facts in the Complaint, the statute of limitations has definitively run on the State's NCFCA claim.

iii. The State Has Pled Sufficient Facts to Plausibly Support Finding Defendant Individually Liable for His False Statements.

Defendant's Argument V must fail because the Complaint pleads facts, and discovery could arguably uncover additional **[*11]** facts, supporting individual liability for the false claims at issue in this case. The Complaint specifically alleges that defendant Hall himself directly made at least one of the false claims at issue. Compl. P 32. Throughout the Complaint, the State alleges that defendant exercised immeasurable and potentially impermissible control over KCA and its board. Compl. *passim.* The State brings an entire claim that defendant's conduct abused his power and denied his duties to the corporate defendant. *See* Compl. Iff 92-106; 125-26 (noting the defendant himself acted outside of his duties to the corporation). This includes Paragraph 100, which alleges "in the face of KCA's financial problems, defendants took a number of wholly unreasonable actions - *including requesting funding for an unattainable number of students."* (emphasis added). To the extent that the State is required to plead that defendant's false statements were *ultra vires* acts in order to hold defendant individually liable, it has. Whether he is actually individually liable for statements defendant directly made is a question of fact for a different phase of this case. But there are certainly sets of facts, if left to **[*12]** develop through further discovery, which could result in defendant's individual liability as pled in the Complaint.

b. The State's Non-Profit Claims Should Survive

Defendant has not met his burden of showing that the State's Second Claim for Relief should be dismissed as a matter of law.

i. The Attorney General Has Standing

Contrary to Defendant's contention that the Attorney General's enforcement role is limited to dissolving nonprofit corporations (Def.'s Argument VII), 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 55 A; 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. § ***[*13]*** 15-9 .3 Chapter 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. The 20-day notice provision defendant relies on serves not as a condition precedent to an action by the Attorney General, but to dissolution of the nonprofit corporation by a court. N.C. Gen. Stat. § 55A-14-30(a) ("the superior court may dissolve a corporation").

Defendant's 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.

ii. The Complaint Cannot Be Dismissed

for Improper Venue

Defendant has waived his right to challenge venue. At this point in the proceeding, 14 months since the Complaint was filed, defendant has participated in this litigation to the point that he has waived the right to challenge venue. *LendingTree, LLC v. Anderson, 228 N.C. App. 403, 409, 747 S.E.2d 292, 297 (2013)* (noting "Factors indicating waiver include: (i) failure to unambiguously raise and pursue a venue objection; (ii) participation in litigation; and (iii) unnecessary delay.")- The pending motion is defendant's first objection to venue. Defendant filed his answer to the Complaint on June 28, 2016, without challenging venue. Defendant has also participated in discovery and filed several motions in addition to the pending one. *Id. at 412, 747 S.E.2d at 299* (participating in discovery factor for waiving venue). **[*14]** It has been 14 months. *See LendingTree at 415, 747 S.E.2d at 301* (a three-year delay constitutes waiver); *Johnson v. Hampton Industries, Inc., 83 N.C. App. 157, 158, 349 S.E.2d 332,333 (1986)* (a ten-month delay constitutes waiver); *Miller v. Miller, 38 N.C. App. 95, 98, 247 S.E.2d 278, 280 (1978)* (one year delay constitutes waiver). At this point, defendant cannot credibly claim that the venue is inconvenient or legally improper. Defendant has waived any venue objection.

Even if defendant had not waived his right to challenge venue, a finding of improper venue would not support dismissal as he requests. *Shaw v. Stiles, 13 N.C. App. 173,176,185 S.E.2d 268, 269 (1971)* ("It has been well settled in this State for many years that venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner.")

iii. Ultra Vires

As explained in Section IV(a)(iii) above, the State's entire complaint (including the claim in question) alleges that defendant used the corporation to enrich himself in violation of his legal duties. *See, e.g., P* 96 ("defendants repeatedly put their own interests ahead of the non-profit they served and the school it ran"); P 45 (noting how defendants made inappropriate payments to themselves as KCA faced insolvency); **[*15]** P 48 (noting that it was unclear if the KCA board was consulted before making questionable payments to defendants). The State clearly makes out a claim that, if proven, defendants made improper payments to themselves under Chapter 55A. Defendant cannot credibly suggest that these payments and decisions, if proven improper and unreasonable under Chapter 55A, were somehow within the scope of his employment. KCA cannot consent to illegal acts. 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 PP 2-3 (requiring charter schools to operate in accordance with "all other applicable laws and regulations").

c. The State's UDTPA Claims Should Not Be Dismissed

Defendants solicited students to enroll in a school they knew would fail. During defendant's advertising campaign, they deceived students by failing to disclose the high likelihood that KCA would fail very soon. Defendant has not established that he is exempt from the UDPTA or how the State's Complaint fails to allege an actionable violation.

To plead an UDTPA **[*16]** 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 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)*.

i. 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. P 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 could have deceived students **[*17]** into enrolling at a school where they might not have enrolled had they been given full information. Compl. P 110.

ii. Defendant's Deceptive Advertising Was "In or Affecting Commerce"

Counter to his assertions, defendant's 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 of Raeford Farms, Inc., 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991)*; *see also Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991)* ("[t]he term '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*.

KCA was soliciting students to convince them to enroll there. State and local governments paid KCA thousands of dollars per student to educate **[*18]** the children. This was defendant's 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. Defendant has not pointed to any authority supporting limiting the UDTPA in that way. The burden of showing that he is exempt from the UDTPA is on defendant. *N.C. Gen. Stat. § 75-1.1(d)*. He has not carried this burden.

iii. Remaining UDTPA Arguments Do Not Warrant Dismissal

Defendant's remaining arguments attempt to impose pleading requirements on the Attorney General that simply do not exist under North Carolina law. The requirement to allege "egregious or aggravating acts" exists only when UDTPA claims are brought based on breach of contract or warranty, which is not what the State has pled here. *See Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 578, 589 S.E.2d 423, 430 (2003)*, *disc. rev. denied, 358 N.C. 377, 598 S.E.2d 138 (2004)*. Defendant's contention that the State fails to plead proximate cause of damages ignores that 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* **[*19]** ; *Marshall, 302 N.C. at 548,276* S.E.2d at 403; *N.C. Gen. Stat. §§ 75-14,75-15.2*. Finally, regardless of the federal rule, defendant cites no decision by any North Carolina state court that supports his contention that a UDTPA claim carries a heightened pleading standard. Def s Mem. at 46, 47. Inferring, as defendant suggests, that UDTPA claims based on deception must be pled as fraud claims ignores that claims of deception under the UDTPA "need not show fraud." *RD&J Props, v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737,748,600 S.E.2d 492,500-01 (2004)*. The State's UDTPA claim that defendants, in undertaking an advertising scheme to pump up enrollment for a school that they knew would likely fail, most certainly meets North Carolina's notice pleading standard. *See* N.C.R. Civ. P., Rule 8(a)(1) (requiring "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief); *see also Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988)* (noting the General Assembly adopted the concept of notice pleading).

V. CONCLUSION

Finally, to the extent that the State has not specifically addressed herein other arguments made by defendant in his Motion to Dismiss - or his 68-page Memorandum in Support of the Motion to Dismiss - 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 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 29th day of June, 2017.

STATE OF NORTH CAROLINA, ex rel.

JOSH STEIN, ATTORNEY GENERAL

MATTHEW L. LILES

State Bar No. 38315

E-mail: *mliles@ncdoj.gov*

Assistant Attorney General

North Carolina Department of Justice

Attorney ***[*20]*** *for Plaintiff*

9001 Mail Service Center

Raleigh, NC 27699-9001

Telephone: 919-716-6000

Facsimile: 919-716-6050

1 Defendant admits that due to a dearth of case law on the NCFCA, federal decisions are instructive interpreting North Carolina's relatively new NCFCA. Def s Mem. at p 23-24.

2 Defendant makes numerous factual claims about the North Carolina Department of Public Instruction's involvement in deriving the 366 number, supported by unauthenticated documents outside of the pleadings. This issue is one to be developed through discovery and briefed on summary judgment, not at a motion to dismiss. To the extent that defendant relies on the government's knowledge to release him of liability for making false claims, the State notes that government knowledge of the falsity of a claim "does not automatically preclude a finding of scienter." *United States ex rel. Burlbaw v. Orenduff 548 F.3d 931, 952 (10th Cir. N.M. 2008)* (emphasis in original); *see also United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1156 (2d Cir. N.Y. 1993)* ("[T]he defendant's knowledge of the falsity of its claim ... is not automatically exonerated by any overlapping knowledge by government officials."); *United States v. Southland* ***[*21]*** *Mgmt. Corp., 326 F.3d 669, 682 n.27 (5th Cir. Miss. 2003)* (Jones, J., concurring) ("Courts have qualified the importance of government knowledge by stating that it may not always provide a conclusive defense to the claimant.").

3 This duty to investigate potential violations of law include violations "by any such corporation, officers or agents or employees thereof." *N.C. Gen. Stat. § 75-9*.

End of Document