

NORTH CAROLINA

HALIFAX COUNTY

MILTON JAMES GARRETT, on behalf of
himself and the CITY OF ROANOKE RAPIDS
and its TAXPAYERS

Plaintiff.

vs.

RANDLE "RANDY" H. PARTON; RICHARD
"RICK" G. WATSON, ERNEST C.
PEARSON; MOONLIGHT BANDIT
PRODUCTIONS, LLC; MOONLIGHT
BANDIT PROPERTIES, LLC; FRIENDS OF
MOONLIGHT BANDIT, LLC; MOONLIGHT
BANDIT CONCESSIONS, LLC;
MOONLIGHT BANDIT MERCHANDISING,
LLC; NORTHEASTERN NORTH CAROLINA
REGIONAL ECONOMIC DEVELOPMENT
COMMISSION; AND NORTH CAROLINA'S
NORTHEAST PARTNERSHIP.

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-922

**MOTION TO DISMISS BY PARTON AND
MOONLIGHT COMPANIES**

Defendants Randle "Randy" H. Parton ("Parton"); Moonlight Bandit Productions, LLC; Moonlight Bandit Properties, LLC; Friends of Moonlight Bandit, LLC; Moonlight Bandit Concessions, LLC; and Moonlight Bandit Merchandising, LLC ("Moonlight Companies"), by and through their attorneys Poyner & Spruill LLP, hereby move the Court pursuant to North Carolina Rule of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Plaintiff's Complaint. The basis for this Motion is set forth in the Legal Memorandum Parton and the Moonlight Companies have filed contemporaneously with this Motion.

WHEREFORE, Parton and the Moonlight Companies respectfully request that the Court dismiss Plaintiff's Complaint with prejudice.

This the 28th day of August, 2008.

POYNER & SPRUILL LLP

By: /s/ J. Nicholas Ellis
J. Nicholas Ellis
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"Randy" H. Parton and Moonlight
Companies*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MOTION TO DISMISS** by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person(s) at the following address which is the last address known to me:

Jeanette K. Doran North Carolina Institute for Constitutional Law 333 E. Six Forks Road, Suite 180 Raleigh, NC 27609 <i>Attorneys for Plaintiff</i>	Mark A. Finkelstein Smith Moore LLP 2800 Two Hannover Square Raleigh, NC 27601 <i>Attorneys for Ernest C. Pearson</i>
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This the 28th day of August, 2008.

POYNER & SPRUILL LLP

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REGIONAL ECONOMIC DEVELOPMENT
COMMISSION; AND NORTH CAROLINA'S
NORTHEAST PARTNERSHIP.

Defendant.

**MEMORANDUM OF LAW IN SUPPORT
OF PARTON AND MOONLIGHT
COMPANIES' MOTIONS TO DISMISS**

Defendants Randle "Randy" H. Parton ("Parton"); Moonlight Bandit Productions, LLC; Moonlight Bandit Properties, LLC; Friends of Moonlight Bandit, LLC; Moonlight Bandit Concessions, LLC; and Moonlight Bandit Merchandising, LLC ("Moonlight Companies"), by and through their attorneys Poyner & Spruill LLP, respectfully submit the following in support of their Motion to Dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

STATEMENT OF THE FACTS

This is an action by Plaintiff in which he attempts to bring a derivative action on behalf of the City of Roanoke Rapids and its taxpayers. Plaintiff alleges Defendants misappropriated

public monies and properties by wrongfully inducing Roanoke Rapids to finance a theater for Defendants' benefit. Plaintiff contends Defendants committed a civil conspiracy, breaches of fiduciary duty, unfair and deceptive acts or practices, common law fraud and that Defendants tortiously acted in concert and made fraudulent misrepresentations to Roanoke Rapids.

Plaintiff's lawsuit, which is being directed by the North Carolina Institute for Constitutional Law, tries to vacate the judgment and actions of the Roanoke Rapids City Council when it decided to build a "Music & Entertainment Zone" that had as its centerpiece, a music theater featuring Parton as the entertainment headliner. After months of negotiations, Roanoke Rapids, Parton and Moonlight Bandit Productions ("MBP") entered into an Economic Development Agreement ("EDA") that was the foundation for the rights and obligations of the parties concerning the construction and operation of the music theater. The EDA is identified as Exhibit A to Plaintiff's Complaint and is dated June 30, 2005.

The music theater (named "The Randy Parton Theatre") opened in July 2007. Parton leased the theater beginning in March, 2007 and began live performances in July, 2007. He continued to perform in the music theater for several months thereafter. However, due to disagreements over the operation of the theater, Parton and MBP entered into a Performance and Management Agreement ("PMA") with Roanoke Rapids on November 20, 2007. The PMA, among other things, turned over all aspects of management and operation of the theater to Roanoke Rapids. It also terminated the lease of the theater by MBP. It reestablished an "Artist Fee" that would be paid to Parton, which was different than the Artist Fee due him under the EDA.

Due to subsequent disagreements between the parties concerning theater operations and performances by Parton, they reached a Settlement Agreement and Release of All Claims dated

February 29, 2008 ("Settlement Agreement"). The Settlement Agreement, which is described in Paragraph 44 of Plaintiff's Complaint, included the "release" provision in which Parton and the Moonlight Companies were released by Roanoke Rapids of any and all claims known or unknown relating to the EDA, the PMA, or the creation, ownership, management, promotion of, or operation of the theater with the parties' clear intention to further discharge and release each other from all past, present and future claims.

Plaintiff, an alleged citizen and resident of Roanoke Rapids and a taxpayer of that City, has now brought this action on behalf of himself, Roanoke Rapids and its taxpayers to recover monetary damages from Defendants. However, Plaintiff lacks standing to bring this action for himself. Plaintiff also failed to satisfy the legal requirements to bring this action on behalf of Roanoke Rapids or its taxpayers. Further, his Complaint alleges Roanoke Rapids completely released Parton and the Moonlight Companies from any and all claims concerning the theater, and he can have no greater rights than Roanoke Rapids. As Roanoke Rapids released Parton and the Moonlight Companies from any claims concerning the theater, Plaintiff is bound by that release and barred from bringing this action.

LEGAL AUTHORITY

I. Plaintiff Lacks Standing to Bring this Action Against Parton and Moonlight Companies.

Standing is properly challenged by a North Carolina Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). As the party invoking jurisdiction, plaintiff has the burden of proving the elements of standing. Blinson v. State, __ N.C. App. __, __, 651 S.E.2d 268, 273 (2007). Generally, an individual taxpayer has no standing to bring a suit in the public interest.

Fuller v. Easley, 145 N.C.App. 391, 553 S.E.2d 43 (2001); Green v. Eure, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975). The rare exception to this general rule is that a taxpayer may have standing if he can demonstrate:

“[A] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose [:] that the carrying out of [a] challenged provision will cause him to sustain personally, a direct and irreparable injury [:] or that he is a member of the class prejudiced by the operation of [a] statute.”

Fuller v. Easley, 145 N.C.App. 391, 395, 553 S.E.2d 43, 46-47 (2001) quoting TexFi Industries v. City of Fayetteville, 44 N.C.App. 268, 270, 261 S.E.2d 21, 23 (1979) (brackets in original.)

Plaintiff's Complaint does not and cannot allege a tax levied upon him that is for an unconstitutional, illegal or unauthorized purpose. See Blinson v. State, __ N.C.App. __, 651 S.E.2d 268 (2007) (upholding the constitutionality of government economic incentives). Plaintiff cannot and has not alleged that the carrying out of a challenged provision will cause him to sustain personally, a direct and irreparable injury. In fact, the injury alleged by Plaintiff is an injury that he contends will be borne by all Roanoke Rapids taxpayers and then only indirectly through the need to possibly raise taxes in the future. See, e.g., Complaint at ¶¶ 55-56. Finally, Plaintiff does not allege that he is a member of a class prejudiced by the operation of a statute. Therefore, under established North Carolina law, Plaintiff cannot satisfy any of the three theories that would allow him to sue directly as an individual taxpayer. See Fuller v. Easley, 145 N.C. App. at 395, 553 S.E.2d at 46-47.

Plaintiff instead purports to bring this action for the benefit of Roanoke Rapids and seeks to restore to the City and its taxpayers the losses incurred by them as a result of the alleged wrongful conduct of Defendants. Complaint ¶ 4. North Carolina law allows a taxpayer to bring an action on behalf of a public agency or political subdivision if the proper authorities

wrongfully neglect or refuse to act (“derivative taxpayer standing”). Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). No North Carolina case has recognized that a taxpayer has standing to sue a private person or entity when a public agency or political subdivision has taken legal action in good faith to resolve all claims against the private person or entity. Cf. Goldston v. State, 361 N.C. 26, 637 S.E.2d 876 (2006) (holding that a taxpayer has standing to bring an action against appropriate *government officials* for alleged *misuse or misappropriation* of public funds). In this case, Plaintiff alleges that the City entered into a Settlement Agreement with Parton and Moonlight Companies. He does not allege any bad faith on the City’s part. Thus, since the City took legal action in good faith (executing the Settlement Agreement with Parton and the Moonlight Companies), none of the cases analyzing derivative taxpayer standing apply, and Plaintiff has no standing to sue on behalf of the City.

Even if the cases interpreting derivative taxpayer standing applied in this case, Plaintiff still could not establish standing because he has not met the requisites for standing outlined in those cases. The derivative taxpayer standing cases hold that to survive a 12(b)(1) motion to dismiss for lack of standing, Plaintiff must allege (1) that there has been both a demand on and wrongful refusal by the proper authorities to act, or (2) particular facts which would make such a demand futile. See Fuller v. Easley, 145 N.C. App. at 395, 553 S.E.2d at 47; Whitmire v. Cooper, 153 N.C. App. 730, 570 S.E.2d 908 (2002). Plaintiff can do neither and he has not done so in his Complaint. The Complaint should therefore be dismissed pursuant to Rule 12(b)(1).

A. There was no demand on and wrongful refusal by the proper authorities to act.

An essential element to derivative taxpayer standing is that there was a demand on and a wrongful refusal by the proper authorities to act. See, e.g., Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). Plaintiff’s Complaint does not allege that he or anyone else made

a demand on the City to act. Thus, Plaintiff cannot achieve derivative taxpayer standing through this avenue. Moreover, even if there had been a demand, there was no refusal by the City to act. According to Plaintiff's own allegations, in February 2008, long after all of the facts giving rise to the causes of action had occurred, the City entered into a Settlement Agreement with Defendants Parton and Moonlight Companies. Complaint ¶ 44. Pursuant to the Settlement Agreement, the City agreed to pay \$750,000 to Defendants Parton and Moonlight Companies in consideration of the release of and from any and all claims, actions or causes of action which each party to the Settlement Agreement had or might have had against the other party at the time it was executed. Complaint ¶ 44. Since the Complaint reveals that the City did act and not that it neglected or refused to act, Plaintiff lacks standing to bring this suit against Parton and Moonlight Companies.

While the case law regarding derivative taxpayer standing sometimes states that there must be a refusal of the taxing authority to "institute proceedings," this phrase is dicta as it has not been essential to any of the holdings in the cases. See, e.g., Whitmire v. Cooper, 153 N.C. App. 730, 570 S.E.2d 908 (2002) (stating that to have standing as a taxpayer to sue on behalf of a public agency or political subdivision there must have been a demand on and refusal by the proper authorities to "institute proceedings" and holding that the plaintiffs lacked standing because there was no allegation in the complaint of a *wrongful* refusal to act). No North Carolina case holds that a taxpayer may sue when the public agency or political subdivision has in good faith entered into a settlement agreement with the defendant which completely resolves all legal disputes between them. Moreover, a city has the authority to resolve legal disputes by entering into a settlement agreement without instituting formal legal proceedings. See Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259 (2005). To allow this Plaintiff to sue on behalf of

Roanoke Rapids when the City Council has already considered and fully resolved its disputes with Parton and the Moonlight Companies would do nothing but encourage “the disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers.” Branch v. Board of Educ., 233 N.C. 623, 65 S.E.2d 124 (1951) (explaining why a taxpayer cannot bring an action on behalf of a public agency or political subdivision where the proper authorities have not wrongfully neglected or refused to act). Thus, the fact that Roanoke Rapids did not institute formal legal proceedings does not mean that it did not take appropriate action so as to defeat derivative taxpayer standing. Since it took action by entering into the Settlement Agreement with Parton and Moonlight Companies, Plaintiff cannot meet this element of taxpayer standing and the Complaint should therefore be dismissed as to these defendants.

Finally, an essential element of the first prong of derivative taxpayer standing is that the refusal to act was wrongful. See, e.g., Whitmire v. Cooper, 153 N.C. App. 730, 570 S.E.2d 908 (2002). Even if Roanoke Rapids neglected or refused to act, there is no allegation in the Complaint that such refusal was wrongful. The only reference to any act or refusal to act by the City is the allegation in Paragraph 44 that Roanoke Rapids entered into a “so-called Settlement Agreement” with Parton “without the approval of Plaintiff or his fellow taxpayers.” However, there is nothing “wrongful” about the City entering into the Settlement Agreement without voter approval. North Carolina General Statute § 160A-11 gives a city the right to sue and be sued and the right to contract and be contracted with. “A settlement agreement is a contract resolving a dispute without a trial.” Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259 (2005), and cities are free to enter into such contracts. See id. There is no law in North Carolina requiring a city to obtain voter approval for settlement agreements. A local government has discretion to decide whether to enter into a settlement agreement, and absent an allegation that the conduct of

local government officials was wrongful, a taxpayer does not have standing to sue on behalf of that local government. See Branch v. Board of Educ., 233 N.C. 623, 65 S.E.2d 124 (1951) (explaining that to avoid “officious intermeddling by taxpayers in matters committed to the decision of public officers,” the law requires a wrongful refusal to act) (emphasis added). Thus, since there are no allegations that Roanoke Rapid’s action or refusal to act was wrongful, Plaintiff cannot meet the prerequisites of the first prong of derivative taxpayer standing.

B. Plaintiff Does Not Allege Particular Facts that Make a Demand on the City Futile.

Under the second prong of derivative taxpayer standing, a taxpayer may have standing to bring an action on behalf of a public agency or political subdivision without first demanding that the proper authorities act if the circumstances are such as to indicate affirmatively that such a demand would be futile. Branch v. Board of Educ., 233 N.C. 623, 65 S.E.2d 124 (1951), Fuller v. Easley, 145 N.C. App. 391, 553 S.E.2d 43 (2001). This element, like all of the elements of derivative taxpayer standing, comes from corporate law. See, e.g., Merrimon v. Paving Co., 142 N.C. 539, 55 S.E. 366 (1906) (citing corporate law and finding that the same rules regarding a shareholder’s standing to sue on behalf of a corporation apply to taxpayers who sue on behalf of a municipality). The North Carolina Court of Appeals has explained the “futility” requirement in the context of a derivative shareholder action as follows:

A demand for action by the directors is unnecessary only when the complaint alleges with particularity facts indicating that such a demand would be futile. Particular facts that excuse a shareholder from demanding action by the board of directors before suing to enforce a corporate right include, so our courts have held, those that indicate corruption or bad faith by the directors, such as self-dealing or self-interest, fraud, or conflict of interest.

Roney v. Joyner, 86 N.C. App. 81, 356 S.E.2d 401 (1987). Like a shareholder, a taxpayer is excused from making a demand on the proper authorities only when there are allegations which

indicate that a demand on those authorities would be futile because the authorities have not or are not acting in good faith on behalf of the public agency or political subdivision. See Merrimon v. Paving Co., 142 N.C. 539, 55 S.E. 366 (explaining in a derivative taxpayer action that there is an exception to the requirement of demand only when there is fraud or the threatened action is *ultra vires*).

In Merrimon, taxpayers sued a construction company, alleging that the company did not provide the quality of paving services promised under the contract with the city. Id. The taxpayers did not allege that they made a demand on the city before instituting the action. Id. at 553, 55 S.E. at 370. The North Carolina Supreme Court analyzed the exceptions to the requirement of such a demand and found that since the plaintiffs did not allege with particularity any fraud on behalf of the city authorities, or that the city authorities were acting oppressively, illegally, or for their own interest in a manner destructive to the city, the plaintiffs were not excused from the requirement of making a demand on the city. Id. The fact that the city authorities' opinion about the quality of the work differed from the opinion of the plaintiffs did not give the plaintiffs the right to sue without first making a demand upon those authorities. Id. See also Murphy v. City of Greensboro, 190 N.C. 268, 129 S.E.614 (1925) (holding that the plaintiff did not need to make a demand on the city when the city council's good faith was directly assailed by allegations that it unlawfully and secretly devised a scheme to award a contract to one company while disregarding the bid of another).

In this case, the pertinent allegations are as follows:

Plaintiff brings this action on behalf of himself and the City of Roanoke Rapids because the City is unlikely to take such action, including litigation, as may be necessary to recover from Defendants the losses and damages incurred as a result of Defendants' actions as alleged herein. A request of the City to act would be futile as evidenced by the City's decision to enter into a so-called Settlement Agreement in February 2008 with Defendants Parton and Moonlight Companies, without the approval of Plaintiff or his

fellow taxpayers. Pursuant to the Settlement Agreement, the City agreed to pay \$750,000 to Defendants Parton and Moonlight Bandits in consideration of the release of and from any and all claims, actions or causes of action which each party to the Settlement Agreement had or might have had against the other party at the time the Settlement Agreement was executed.

Complaint ¶ 44. While the Complaint makes the bare assertion that a demand on the City would be futile because the City entered into the Settlement Agreement with Parton and Moonlight Companies, it does not allege any of the facts identified in North Carolina case law that excuse such a demand. As discussed above, cities have a right to enter into settlement agreements, and there is no law requiring voter approval of such agreements. The Complaint does not allege any bad faith whatsoever on the part of Roanoke Rapids officials. It does not allege any facts to indicate that they were acting in their own interests to the detriment of the City or that the City officials were acting illegally, fraudulently or oppressively. Thus, Plaintiff does not fall within the futility exception and was required to make a demand on the City. The failure to make and allege this demand is grounds for dismissing Plaintiff's Complaint.

Plaintiff's counsel indicated their reliance on Guilford County v. Trogdon, 124 N.C. App. 741, 478 S.E.2d 643 (1996) to show that the facts of this case fall within the futility exception. In Trogdon, the Court of Appeals held since the Board of Education voted not to take legal action to recover \$275,000 illegally paid to defendant, it would have been useless for the taxpayers to demand that the Board institute proceedings against the defendant. The Court of Appeals did not discuss or analyze the futility exception beyond declaring that it would have been useless for the taxpayers to make such a demand in that case. While it is unclear from the opinion what about the Board's vote in Trogdon made such a demand futile as defined in North Carolina law, it is clear that Trogdon does not and cannot change the law with regard to the futility exception since Trogdon cites with approval the North Carolina Supreme Court case of

Branch v. Board of Educ., 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951), which in turn cites the Merrimon v. Paving Co. and Murphy v. City of Greensboro cases discussed above. Moreover, the facts of Trogdon are clearly distinguishable from the facts of this case. In Trogdon, unlike in this case, the proper authorities took a vote in which they decided not to take any legal action. In this case, the proper authorities did take legal action by entering into a valid Settlement Agreement with Parton and the Moonlight Companies. Since there is no allegation of bad faith on behalf of the City officials, Plaintiff's Complaint does not fall within the futility exception, and he was required to make his demands on the City officials before filing suit. The Plaintiff did not do this, and therefore, he has not met the requirements of either the first or second prong for derivative taxpayer standing. Thus, Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

II. Even if Plaintiff has Standing, He has Failed to State a Claim Against Parton and Moonlight Companies.

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, a claim should be dismissed if: (1) no law exists to support the claim; (2) sufficient facts to make out a valid claim are absent; or (3) facts are disclosed that will necessarily defeat the claim. Perry v. Carolina Builders Corp., 128 N.C. App. 143, 146, 493 S.E.2d 814, 816 (1997) (citing Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981)). "On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is 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." Hunter v. Guardian Life Ins. Co., 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (2004) (citations omitted). Thus, the pleaded facts are the determining factors in deciding whether a complaint states a claim upon which relief can be

granted. The mere assertion of a grievance, however, is insufficient to state a claim for relief. Smith v. City of Charlotte, 79 N.C. App. 517, 527-28, 339 S.E.2d 844, 851 (1986) (citing Sutton v. Duke, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970)).

A derivative claim depends on the validity of the original claim of the person or entity through whom the claim is derived. See Southerland v. Kapp, 59 N.C. App. 94, 295 S.E.2d 602 (1982) (holding a husband's claim for loss of consortium is derivative and is therefore properly dismissed when his wife's claim was dismissed); 74 Am. Jur. 2d Taxpayers' Actions § 4 (2008) ("in a derivative action by resident taxpayers, the plaintiffs have no greater rights than the taxing district itself possessed"). By signing a general release, a plaintiff discharges all claims between the parties. See Merrimon v. The Postal Telegraph-Cable Co., 207 N.C. 101, 106, 176 S.E. 246, 248 (1934). Spivey v. Lowery, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (1994). Thus, if the original claim has been discharged by a release, so, too, has the derivative claim. See Spivey v. Lowery, 116 N.C. App. 124, 127, 446 S.E.2d 835, 838 (1994) (holding that if a plaintiff signs a general release releasing all claims against a tortfeasor, she may not later seek to recover against an underinsured motorist carrier whose liability is derivative).

In this case, Plaintiff is suing on behalf of Roanoke Rapids and his claims are derivative in nature. Complaint ¶ 44. Indeed, all of the causes of action which Plaintiff asserts against Parton and the Moonlight Companies are derived from Parton's actions and dealings with Roanoke Rapids. As discussed above, municipalities have the right to enter into settlement agreements and there is no law in North Carolina that requires a municipality to obtain voter approval for settlements. See N.C. Gen. Stat. §160A-11; Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259 (2005). Plaintiff's Complaint on its face alleges that in February, 2008, Roanoke Rapids entered into a contract with Parton and the Moonlight Companies and pursuant

to the contract (the Settlement Agreement). Roanoke Rapids agreed to pay \$750,000 to Defendants Parton and the Moonlight Companies "in consideration of the release of and from any and all claims, actions or causes of action which each party to the Settlement Agreement had or might have had against the other party at the time the Settlement Agreement was executed." Complaint ¶ 44 (emphasis added). Plaintiff does not assert any allegations that would make the Settlement Agreement void. Thus, according to Plaintiff's own allegations, any claim Roanoke Rapids had against Parton or the Moonlight Companies would be barred by the Settlement Agreement. Since Plaintiff's alleged claims are derived from Roanoke Rapids' claims, Plaintiff's claims are also barred by the Settlement Agreement. Thus, Plaintiff has failed to state a claim upon which relief can be granted, and the Complaint should be dismissed as to Parton and the Moonlight Companies pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

CONCLUSION

Plaintiff has not alleged elements that are essential to establish his standing to bring suit against Parton and the Moonlight Companies, and his Complaint should therefore be dismissed pursuant to North Carolina Rule of Civil Procedure 12(b)(1). Even if Plaintiff does have standing to bring this action, he has not stated a claim against Parton and the Moonlight Companies for which relief may be granted because the Complaint alleges that a Settlement Agreement released all claims that Roanoke Rapids had against Parton and the Moonlight Companies. Since Plaintiff's claim is derivative, his Complaint should also be dismissed pursuant to Rule 12(b)(6).

This the 28th day of August, 2008.

By: /s/ J. Nicholas Ellis
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **MOTION TO DISMISS** by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person(s) at the following address which is the last address known to me:

Jeanette K. Doran North Carolina Institute for Constitutional Law 333 E. Six Forks Road, Suite 180 Raleigh, NC 27609 <i>Attorneys for Plaintiff</i>	Mark A. Finkelstein Smith Moore LLP 2800 Two Hannover Square Raleigh, NC 27601 <i>Attorneys for Ernest C. Pearson</i>
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This the 28th day of August, 2008.

POYNER & SPRUILL LLP

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