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STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF HALIFAX BY  SUPERIOR COURT DIVISION
08 CVS 922

JAMES GARRETT)
)
Plaintiff,)

v.)

PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS

RANDLE "RANDY" PARTON;)
RICHARD "RICK" WATSON;)
MOONLIGHT BANDIT PRODUCTIONS,)
LLC; MOONLIGHT BANDIT)
PROPERTIES, LLC; FRIENDS OF)
MOONLIGHT BANDITS, LLC;)
MOONLIGHT BANDIT CONCESSIONS,)
LLC; MOONLIGHT BANDIT)
MERCHANDISING, LLC;)
NORTHEASTERN NORTH CAROLINA)
REGIONAL ECONOMIC)
DEVELOPMENT COMMISSION; AND)
NORTH CAROLINA'S NORTHEAST)
PARTNERSHIP;)
Defendants.)

NOW COMES Plaintiff, by undersigned counsel, and hereby responds to Defendants
Northeastern North Carolina Regional Economic Development Commission and North
Carolina's Northeastern Partnership's Motion to Dismiss and Motion for More Definite
Statement and Motions to Dismiss filed by all Defendants.

FACTS

Plaintiff instituted this action on June 19, 2008. Defendants Northeastern North Carolina
Regional Economic Development Commission ("Commission") and North Carolina's

Northeastern Partnership (“Partnrship”) filed a Motion to Dismiss and a Motion for a More Definite Statement on August 29, 2008, based largely on the grounds that the lawsuit as filed was vague and ambiguous. Defendants Randle Parton and Moonlight Bandits filed a Motion to Dismiss on August 29, 2008. Defendant Richard Watson filed a Motion to Dismiss on September 11, 2008. On September 26, 2008, Plaintiff filed a Notice of Dismissal dismissing claims against Ernest Pearson and an Amended Complaint with Exhibits.

The Motion to Dismiss rests largely on the assertion that the Complaint fails to state a claim upon which relief may be granted and that Plaintiff lacks standing. The Motion to Dismiss filed by the Commission and the Partnership requests, in the alternative, a more definite statement. Plaintiff submits that that request was mooted by Plaintiff’s filing of an Amended Complaint on September 26, 2008, which provides a more definite statement than appeared in the originally filed Complaint. Plaintiff further submits that the Amended Complaint sets forth claims which more clearly articulate the claims upon which Plaintiff seeks relief, and therefore Plaintiff’s counsel contacted Defendants’ counsel and suggested a joint motion to continue until such time as Defendants have had an opportunity to file a supplemental memoranda of law based on the Amended Complaint and Plaintiff has had an opportunity to file a response. Defendants’ counsel rejected that offer. According, Plaintiff submits this response.

ARGUMENT

I. STANDARD FOR CONSIDERATION OF A MOTION TO DISMISS

“When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings.” *Department*

of Transp. v. Blue, 147 N.C.App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court must accept all well-pleaded factual allegations of the Complaint as true and the Complaint must be construed in the light most favorable to the plaintiffs. *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *cert. denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). Dismissal of the complaint is proper only when it is clear that the plaintiff could prove no set of facts which would entitle him or her to relief. *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997). The question is “whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Coleman v. Town of Hillsborough*, 173 N.C. App. 560, 563-34, 619 S.E.2d 555, 558 (2005). “An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.” *Bryant v. Don Galloway Homes, Inc.*, 147 N.C.App. 655, 657, 556 S.E.2d 597, 599-600 (2001) (internal quotations omitted). “An issue is genuine if it is supported by substantial evidence.” *Id.*

II. PLAINTIFF HAS STANDING TO ASSERT A LEGAL CHALLENGE TO THE ILLEGAL DISBURSEMENT OF PUBLIC FUNDS ON THE GROUNDS THAT I) HE IS A TAXPAYER; AND II) THE PROPER AUTHORITIES HAVE REFUSED TO ACT.

“Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.” *American Woodland Industries, Inc. v. Tolson*, 155 N.C. App. 624, 574 S.E.2d 55 (N.C. App. 2002). Here,

Plaintiff is a resident and taxpayer of the City of Roanoke Rpaids (“the City”), Halifax County and the State of North Caroina. (Compl. ¶ 3).

Defendant contends that there is a lack of subject matter jurisdiction in this case. “Subject matter jurisdiction exists only if a plaintiff has standing.” *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (N.C. App. 2000). Since Plaintiff has standing in this case, Defendant’s contention is misguided and erroneous, and dismissal pursuant to Rule 12(b)(1) is not appropriate.

A. Taxpayer Standing

Taxpayers have standing to assert constitutional challenges to the expenditure of public monies. *See Goldston v. Harrington*, 361 N.C. 26, 637 S.E.2d 876 (2006). In *Goldston*, the issue before the Court was “whether individual taxpayers have standing to seek relief when they allege government officials violated statutory and constitutional provisions...” *Id.* at 27-28, 637 S.E.2d at 878. The Court emphatically answered the question “Yes.” *Id.* at 28, 637 S.E.2d at 878. In fact, the Court explicitly stated, “We reaffirm our long-standing holdings that taxpayers have standing to challenge unlawful or unconstitutional government expenditures and conclude that taxpayers are entitled to seek equitable relief in the form of a declaratory judgment.” *Id.* In actions involving issues of significant public interest, “courts have often broadened both standing and evidentiary parameters...” *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 615, 599 S.E.2d 365, 376 (2004).

In *Goldston*, the Court held that taxpayers have standing because “[t]heir claim of illegal and unconstitutional diversion of funds derived from taxes paid by plaintiffs...is an actual controversy between the parties.” 361 N.C. at 34, 637 S.E.2d at 881. Applying this principle to

the instant action, Plaintiff has standing because his complaint is a challenge to the unlawful diversion of funds from the public treasury to which he pays taxes to finance projects for the benefit of Defendants Watson and Parton. Moreover, the Commission and Partnership are funded by tax money—including taxes paid by Plaintiff. (Compl. ¶¶ 7-8, 76-77, 87). Plaintiff has alleged an illegal expenditure of funds and further that he is a taxpayer to the City and State. As the *Goldston* Court recognized, taxpayer standing “cannot be denied” when the case before a court concerns “the right of a citizen and taxpayer to maintain an action in the courts to restrain unlawful use of public funds to his injury.” *Id.* at 33, 637 S.E.2d at 881 (citing *Teer v. Jordan*, 232 N.C. 48, 51, 59 S.E.2d 359, 362 (1950)) (external notations omitted).

In *Goldston*, the taxpayers sought a declaration as to the legality of the Governor’s and the General Assembly’s diversions from the [Highway] Trust Fund.” *Id.* Here, Plaintiff has alleged that government agencies, specifically the Commission and the Partnership, a government employee, and a individual, together with the companies through which they worked, illegally procured public financing for a project intended to personally benefit Watson and Parton. Plaintiff seeks a declaration that all contracts, including the Settlement Agreement, entered into pursuant to Defendants’ scheme be declared null and void, that Defendants be ordered to refund and return all monies from the scheme to the City and the State. Thus, *Goldston* is binding precedent on point that expressly allows taxpayer standing. Where Plaintiff is a taxpayer and has alleged a illegal and impermissible expenditure or collection of government funds, he has standing to assert a claim. *Id.* Here, the Complaint clearly alleges several misuses of public funds as well as the resulting diminution in the public funds available for lawful purposes. As such, Plaintiff has standing under *Goldston*.

Traditionally, the gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968)). While Goldston makes clear such an inquiry is unnecessary in a taxpayer challenge to allegedly unlawful expenditures of public money, even if the Court relied on the tradition standing analysis. Plaintiff has standing. Plaintiff, as a resident and taxpayer of the City and the State, has a personal stake in assuring that his local and State will use their respective finite resources appropriately so that funds remain available for lawful purposes. (Compl. ¶ 138). Plaintiff also alleged more specifically that a City official already notified the City's mayor that because of the debt incurred to finance the Theater the City could not offer other economic development incentives to possible other development in the Carolina Crossroads district. (Compl. ¶ 60).

The right of a resident and taxpayer of a city to petition the courts for redress of governmental wrongs in public expenditures arises "from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries." *Stratford v. City of Greensboro*, 124 N.C. 127, 134, 32 S.E. 394, 396-7 (1899).

The standing issue in the case at hand is similar to the facts in *Teer v. Jordan*. 232 N.C. 48, 59 S.E.2d 359 (1950). In *Teer*, Plaintiffs sought to challenge alleged diversion of public funds for secondary roads by members of the State Highway and Public Works Commission. *Id.* Plaintiff was a citizen of Durham County and operators of motor vehicles "over and along the

roads of the County and State” and was “subject to the gallonage tax on motor fuels.” *Id.* at 49, 59 S.E.2d at 360. The Court explicitly stated that “we are not disposed to deny the right of an individual who is one of those for whose benefit the law was enacted to be heard on allegations of an illegal diversion of public funds which may in some degree injuriously affect his rights as a citizen, taxpayer and user of secondary public roads.” *Id.* at 51, 59 S.E.2d at 362.

Likewise, in this case, Plaintiff seek redress for the wrongs committed by Defendants which injuriously affect his rights as a citizen and taxpayer. He has paid his taxes so that the same might be used for lawful government purposes. Now, as a result of the actions of Defendants, the money available for lawful government purposes has been substantially reduced. For example, the State approved \$543,500 in roadway improvements at or adjacent to the Theater site. (Compl. ¶ 49) and \$500,000 requested by Defendant Watson as president of the Commission and Partnership from the State Department of Commerce (Compl. ¶ 45). Finally, Plaintiff has alleged that the City incurred debt in the form of \$21.5 million in bonds, which must be repaid. As alleged in the Amended Complaint, the Theater is closed and generating no revenue, certainly not enough revenue to pay the debt servicing on the bonds. (Compl. ¶ 74). The City will have to find a way to repay those bonds and, Plaintiff submits, that will result in a further reduction in the municipal fisc.(Compl. ¶ 75)

B. Derivative Standing

Plaintiff also has derivative standing to sue for the recovery of his misspent tax dollars because the City would not do so. This right of a taxpayer to sue is analogous to the right of a stockholder of a private corporation to maintain a derivative action on behalf of the corporation. *Merrimon v. Paving Company*, 142 N.C. 539, 545, 55 S.E. 366, 432 (1906).

The right to sue for recovery of the government funds of a particular government unit belongs to that unit. *Branch v. Board of Education*, 233 N.C. 623, 65 S.E.2d 124, 126 (1951). However, “a taxpayer [may] bring a taxpayer's action on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act.” *Id.* See also *Waddill v. Mastern*, 172 N.C. 582, 585-86, 90 S.E. 694, 696 (1916). To bring this type of action, taxpayers must show they are a taxpayer of the public agency or political subdivision and must further establish that either: 1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or 2) a demand on the proper authorities would be useless. *Id.* at 626, 65 at 126-27.

Here, the City entered into a so-called Settlement Agreement with Defendant Parton in February 2008. That Agreement purports to release Parton from any claims which the City might have. Although Plaintiff maintains that agreement is invalid and is itself a misuse of government funds, the fact the City entered into that agreement indicates the City's unwillingness to sue for the recovery of City money turned over to or spent on behalf of Defendants. For that reason, any demand by Plaintiff on the City to act to recovery City funds would be useless.

C. The Settlement Agreement Does not Deprive Plaintiff of Standing

Much has been made of the Settlement Agreement entered by the City of Roanoke Rapids and Defendant Parton and the Settlement Agreement has been relied upon to support the assertion that Plaintiff lacks standing. This argument is simply illogical. Plaintiff has standing for the reasons discussed above. The City cannot simply contract away a taxpayer's right to challenge the misuse or misappropriation of public money. No authority has been presented for

such an argument and undersigned counsel's research reveals no support for such an expansive view of a settlement agreement or such a flimsy construction of taxpayer standing. Moreover, the Settlement Agreement depended on a large cash settlement to be paid to Parton. That settlement—worth \$750,000—is itself a misuse and misappropriation of public money, one which Plaintiff seeks to challenge. Standing to challenge the misuse of public money cannot be foreclosed by the further misuse of additional public money.

Not only does the existence of the Settlement Agreement not deprive Plaintiff of standing because a government cannot surrender a citizen's standing, but the settlement agreement also fails to squelch Plaintiff's standing because it is not enforceable. Although Plaintiff intends to more fully develop in his arguments regarding the ineffectiveness of the Settlement Agreement as a bar to this action, in argument on the merits of that defense, a few of the more notable points are questions related to the validity in general of the Settlement Agreement and the scope of the release. Specifically, Plaintiff intends to argue that the City failed to comply with statutory mandates, including requirements for notice and public hearings. *See generally*, N.C.G.S. § 160A-400.25 (“Consideration of a proposed major modification of the agreement shall follow the same procedures as required for initial approval of a development agreement.”) Here, the contract between Moonlight Bandits and the City required the company to satisfy the operating costs of the Theatre (Compl. ¶ 40, Ex. B of Amended Compl.); however, once the release was granted, that burden and others shifted to the City and its taxpayers. Plaintiff also intends to argue that Defendants Parton and Moonlight Bandits are not released from claims by Plaintiff who was not a party to the Settlement Agreement and further that the Settlement Agreement is void as against public policy. *See Contracts* § 5.2 (2d ed. Farnsworth 1990). Finally, Plaintiff has raised issues of constructive fraud and breach of fiduciary duty in Count One. Fraud is also a

basis upon which a contract, including the Settlement Agreement, may be set aside. *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E.2d 382 (1962); *Butler v. Armour & Co.*, 193 N.C. 632, 137 S.E.813 (1927); *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, 93 S.E. 374 (1917).

III. PLAINTIFF HAS STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED

At the outset, it must be noted that the Amended Complaint filed September 26, 2008, included more detailed factual allegations than those initially articulated in the Complaint. Undersigned counsel submits that the Amended Complaint provides a clearer perspective on the facts, the bases for the action, and the culpability of the remaining defendants. The Motions to Dismiss and supporting memoranda were filed prior to the filing of the Amended Complaint and therefore, lack the benefit of the additional factual clarity of the Amended Complaint. Plaintiff submits that the so-called deficiencies have been eradicated by the Amended Complaint.

In filing their Motions to Dismiss Defendants have relied on the original Complaint and have not yet supplemented or replaced their original memoranda of legal authority. Northeastern North Carolina Regional Economic Development Commission and North Carolina's Northeastern Partnership's Motion to Dismiss requests, in the alternative, a more definite statement. Plaintiff submits that this request is mooted by Plaintiff's filing of an Amended Complaint on September 26, 2008, which provides a more definite statement than appeared in the originally filed Complaint.

Plaintiff's Amended Complaint enumerated four bases for relief. Count One alleged breach of fiduciary duty. Count Two alleged tortious acting in concert. Count Three alleged negligent misrepresentation. Count Four alleged negligent supervision.

A. Breach of Fiduciary Duty (Count One)

The Supreme Court has described the necessary elements for a claim of breach of fiduciary duty as follows:

For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . ,[and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001)(internal quotations omitted).

A claim for breach of fiduciary duty requires the existence of a fiduciary relationship. In *Vail v. Vail*, 233 N.C. 109, 114, 202, 206 (1951), the Supreme Court explained: "In general terms, a fiduciary relation is said to exist 'wherever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence.'" *Id.* (quoting 37 C.J.S. *Fraud* § 2, at 213). In *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (internal quotation marks omitted), the Court explained:

The relation . . . not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*, but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Generally, the existence of a fiduciary relationship "is determined by specific facts and circumstances, and is thus a question of fact for the jury." *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 158 (2001) (citing *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665 S.E.2d 831, 832 (1990) (emphasis added)).

Plaintiff has alleged in the Amended Complaint that Defendants Watson, the Commission and the Partnership owed a fiduciary duty to the City and to the taxpayers of the City of Roanoke Rapids and the State of North Carolina. (Compl. ¶¶ 88, 96, 107, 118, 119, 127, 138, 139, 141-43). The duty stems from the Commission's statutory mandate to identify, facilitate, and implement economic development plans and activities on behalf of and for the benefit of the State and certain local government entities and the citizens and taxpayers thereof, and has been entrusted with public funds for the accomplishment of that statutory duty. Defendant Watson's duty comes from his status, at relevant times, as president of the Commission, a position which to N.C.G.S. § 158-8.2(i), specifies is to be held by an "employee." (Compl. ¶¶ 76-83). Watson, the Commission and the Partnership were entrusted with a special confidence by the communities, and taxpayers of Eastern North Carolina. Collectively, they were charged with promoting economic development throughout that region. Watson used the special confidence bestowed upon him to push his own agenda. As alleged in the Amended Complaint, Watson drafted the letter of intent offered by the City to Parton, and Watson had drafted the letter of intent which would have been used by Currituck County for the Theater project had Currituck not bawlked at the scheme. (Compl. ¶¶ 16-18, 25, 91-94, 98) Watson consistently used the cache of his position as president and CEO of the Commission and the Partnership, as well as those entities' resources, to push the City into financing the Theater and the State into approving that financing. . (Compl. ¶¶ 22-26, 27, 82-83, 116).

Defendant Watson worked for Defendant Parton and Moonlight Bandit Companies and held an undisclosed ownership interest in the Moonlight Bandit companies while employed by the Commission. (Compl. ¶¶ 5, 36, 82) Defendant Watson's work for Defendant Parton and the Moonlight Companies he co-owned took place in the ordinary course and scope of the business

of the Commission and the Partnership of which he was president and chief executive officer and used resources, including the services of subordinate employees, of the Commission and the Partnership which were funded by tax dollars. (Compl. ¶¶22, 24, 26, 97)

B. Tortious Acting in Concert (Count Two)

It is a generally accepted rule that where two or more persons unite or intentionally act in concert in committing a wrongful act, or participate therein with common intent, they are jointly and severally liable for the resulting injuries. *S. v. DeHerrodora*, 192 N.C. 749, 136 S.E. 6; *Williams v. Lumber Co.*, 176 N.C. 174, 96 S.E. 950; *Trust Co. v. Peirce*, 195 N.C. 717, 143 S.E. 524; *Moses v. Morganton*, 192 N.C. 102, 133 S.E. 421.

As explained in *Stetser v. TAP Pharm Prod. Inc.* 165 N.C. App. 1, 598 S.E.2d 570 (2004), the Restatement (Second) of Torts describes this action as follows:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts, § 876. (1970). The North Carolina Supreme Court has adopted this section of the Restatement as it is applied to the negligence of joint tortfeasors. *See Boykin v. Bennett*, 253 N.C. 725, 118 S.E.2d 12 (1961) (holding all defendants liable for death of passenger as a result of negligence in racing automobiles upon a public highway).

Plaintiff has alleged that Defendants had a common scheme to use public money to construct and operate a theater for the personal benefit of Defendants Watson and Parton.

Specifically, Plaintiff has alleged that the Commission and Partnership owed a fiduciary duty to the public and Watson, as an employee, also owed a fiduciary duty to the City and State, and to the citizens. (Compl. ¶¶ 88, 96, 107, 118, 119, 127, 138, 139, 141-43). Nevertheless, the Commission and Partnership continued to provide Watson with resources to carry out the plan. Those resources included the assistance of support staff, office space, computers and telephone access. (Compl. ¶¶ 22-26, 83) Perhaps more importantly, the Commission and the Partnership continued to provide Watson with the cache and aura of respectability which accompanied his position as "President and CEO" of both the Commission and the Partnership which is relied upon and manipulated in furtherance of the scheme. (Compl. ¶¶ 27, 82, 116)

Plaintiff has also alleged that Parton joined in what began as Watson's plan and thereafter lent his name and full support to executing the theater plan, including plans to secure public financing of the theater. Parton assisted with the development of the Business Plan, with public relations, and with theater operations all so that he and Watson could ultimately profit at the expense of the people of North Carolina and Roanoke Rapids. (Compl. ¶¶ 16, 20, 25, 29, 33, 35, 39, 40, 129) Parton created and managed the Moonlight Bandit Companies and Watson used his equity interest in Moonlight Bandits as a vehicle for obtaining the profit he had sought from the genesis of this plan. (Compl. ¶¶ 6, 28)

C. Negligent Misrepresentation

A genuine issue of material fact exists concerning Plaintiff's claim for negligent misrepresentation at Count Four. It is well established that "the tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of

care." *Raritan River Steel Co., v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991)

The Supreme Court has elaborated on one of the more troubling elements of the tort in *Marcus Bros. Textiles, Inc. v. PriceWaterhouse, LLP*, 350 N.C. 214, 513 S.E.2d 320 (1999), stating: " the question of justifiable reliance is analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether plaintiff reasonably relied upon the representations made by defendant." *Id.* at 224, 513 S.E.2d at 327 (quoting *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 614, 622, *disc. rev. denied*, 301 N.C. 95 (1980). The Court went on to quote the official commentary to the Restatement (Second) of Torts:

What is reasonable is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors. ***The question is one for the jury, unless the facts are so clear as to permit only one conclusion.***

Marcus Bros., 350 N.C. at 225, 513 S.E.2d at 328, (quoting with emphasis Restatement (Second) of Torts, § 552 cmt. e).

The City of Roanoke Rapids and the State of North Carolina relied on materials, including the business plan, prepared by Watson and Parton with the support of the Commission and the Partnership in authorizing the use of public money to finance the development, construction and operation of the Randy Parton Theater. Likewise, bondholders, banks, underwriters, and attorneys relied on the representations in those materials. As alleged in the Amended Complaint, the Theater has not made a profit and has not made enough money to cover the expenses of construction and operation. (Compl. ¶ 75) The theater is unlikely to do so as it has been closed since July 2008 when the City could no longer afford to operate it. (Compl. ¶ 74) The business plan and other materials and representations made directly or indirectly by the

Defendants were, at best, prepared without sufficient care to ensure that the materials were accurate and communicated to the City and the State and the public at large, including Plaintiff, the full picture of what was afoot with the theater development and construction. As explained above, Plaintiff has also alleged the existence of a fiduciary duty. Accordingly, Plaintiff has alleged facts which create a genuine issue of material fact which must be resolved by the jury.

D. Negligent Supervision

There must be a legal duty owed by the employer to the injured party in order to establish the claim for negligent hiring. Once that duty is established then the plaintiff must prove four additional elements in a negligent hiring and retention case:

(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence.

Kinsey v. Spann, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000).

Plaintiff has alleged that Watson acted negligently in making representations to the City and the State in connection with the theater and its financing, that he was incompetent and unfit to carry out his duties as president of the Commission and the Partnership due to conflicts of interest, that the Commission and Partnership were aware of that unfitness in that Watson used Commission and Partnership resources to carry out his plans for personal profit, and that the City, the State and taxpayers, including Plaintiff, have been injured as a result.

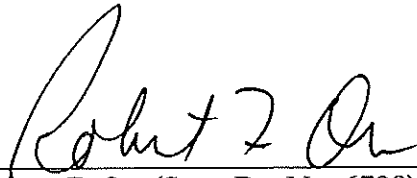
CONCLUSION

Plaintiff has standing as a taxpayer to challenge the misuse or misappropriation of his tax money and additionally has derivative standing because the government has not taken steps to

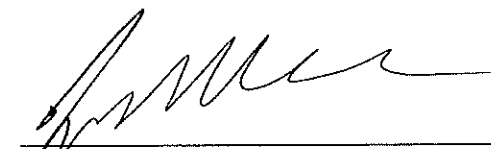
recover money spent as a result of Defendants' scheme. Taken in the light most favorable to Plaintiff, the Amended Complaint states a claim upon which relief can be granted and remedied the alleged deficiencies which formed the basis of the request for a more definite statement. Accordingly, the Motion to Dismiss should be denied

This 3 day of October, 2008.

NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW
333 E. Six Forks Rd., ste 180
Raleigh, North Carolina 27609
Phone: (919) 838-5313
Facsimile: (919) 838-5316



Robert F. Orr (State Bar No. 6798)



Jeanette K. Doran (State Bar No. 29127)

Attorneys for the Plaintiff

