

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO.: 23 CVS 5013

JOSHUA H. STEIN, Attorney General,
ex rel. DOGWOOD HEALTH TRUST,

Plaintiff,

v.

MH MASTER HOLDINGS, LLLP,

Defendant.

**ORDER AND OPINION
ON MOTION TO DISMISS
COUNTERCLAIMS AND PARTIAL
MOTION TO DISMISS REQUEST
FOR ATTORNEYS' FEES**

1. **THIS MATTER** is before the Court on Counterclaim-Defendant's Motion to Dismiss Counterclaims and Partial Motion to Dismiss Request for Attorneys' Fees (the "Motion"), (ECF No. 59).

2. By way of the Motion, Joshua H. Stein, Attorney General for the State of North Carolina, (acting on behalf of Dogwood Health Trust) moves for an order dismissing Defendant's counterclaims, largely on the basis of sovereign immunity. Mr. Stein also requests dismissal of Defendant's request for attorneys' fees.

3. The Court, having considered the Motion, the briefs supporting and opposing the Motion, and the parties' arguments at a hearing held on 28 August 2024, concludes for the reasons set forth herein that the Motion should be **GRANTED in part** and **DENIED in part**.

North Carolina Department of Justice by Sarah G. Boyce, Jasmine S. McGhee, Jessica V. Sutton, Brian Rabinovitz, Logan R. Walters, South A. Moore, Daniel P. Mosteller, and Marc D. Brunton for Plaintiff Attorney General Joshua H. Stein ex. rel. Dogwood Health Trust.

Latham & Watkins, LLP by Allen M. Gardner, Nathan A. Sandals, and Chase A. Chesser; and Roberts & Stevens, PA by Phillip T. Jackson, John Noor, and David Hawisher for Defendant MH Master Holdings, LLLP.

Earp, J.

4. While in the past, the appropriate rule for consideration of a motion to dismiss on grounds of sovereign immunity was somewhat unsettled, recent guidance from our Court of Appeals specifies that these issues should be decided under Rule 12(b)(2). *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023). Accordingly, the Court first addresses Plaintiff's Motion with respect to Defendant's counterclaims on that basis.

5. As this Court recently observed,

The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court. When neither party submits evidence, the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged. The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction.

Johnson Bros. Corp. v. City of Charlotte, 2024 NCBC LEXIS 32 at *11-12 (N.C. Super. Ct. Feb. 27, 2024).

6. Having considered the uncontroverted allegations in the pleadings, the Court makes the following findings of fact and conclusions of law for the purpose of determining whether Defendant has established by a preponderance of the evidence

that the Court has personal jurisdiction over Mr. Stein, acting on behalf of Dogwood Health Trust.

I. FINDINGS OF FACT

7. Plaintiff and Counterclaim-Defendant Joshua H. Stein, Attorney General for the State of North Carolina (the “Attorney General” or “Plaintiff”), brought this action on behalf of and in the name of Dogwood Health Trust, a non-profit corporation. (Am. Compl. [“Am. Compl.”] ¶ 1, ECF No. 50.)¹

8. Defendant and Counterclaim-Plaintiff MH Master Holdings, LLLP (“MH Master Holdings” or “Defendant”) is a limited liability limited partnership formed under the laws of the State of Delaware and registered with the North Carolina Secretary of State. (Def.’s Answ. and Countercls. to Pl.’s Am. Compl. [“Countercls.”] ¶ 1, ECF No. 55.) MH Master Holdings is a subsidiary of HCA Healthcare, Inc (“HCA”). (Countercls. ¶ 3.)²

9. This case centers on the terms of an Amended and Restated Asset Purchase Agreement (“APA”) between MH Master Holdings and Mission Health System (“Mission Health”) memorializing MH Master Holdings’ acquisition of

¹ Dogwood Health Trust is identified as the “Foundation” in the APA. (Countercls. ¶ 6.)

² Pursuant to Section 7.10 of the APA, MH Master Holdings is authorized to do business under brand names including “Mission Health,” “Mission Health System,” and “HCA.” (Am. Compl. ¶ 9.) For purposes of the Motion, the Court at times refers to MH Master Holdings as “HCA.”

Mission Health, a six-campus hospital system serving western North Carolina. (Countercls. 49.)³

10. Defendant asserts that Dogwood Health Trust “is a party to the counterclaims in name only, as Plaintiff has usurped Dogwood Health Trust’s role as the party responsible for working with HCA to ensure the continued delivery of high-quality, affordable healthcare services in western North Carolina.” (Countercls. ¶6.)

11. Section 7.13(a) and Schedule 7.13(a) of the APA (the “Hospital Service Commitments”) speak to HCA’s obligations with respect to the continuation of certain services by Mission Health during the ten-year period from 2019 to 2029, barring certain contingencies or extenuating circumstances.⁴ (Am. Compl., Ex. 1, APA and Schedules [“APA”] Section 7.13(a), Schedule 7.13(a), ECF No. 50.1.) HCA alleges that the Hospital Service Commitments are clear and unambiguous, and that HCA satisfies them. (Countercls. 46-47.) HCA characterizes the Hospital Service Commitments at issue as requiring that HCA: “(1) maintain Level II trauma capabilities at Mission Hospital; and (2) maintain the capabilities to provide the

³ Defendant’s introduction to the counterclaims contains unnumbered paragraphs; consequently, the Court refers to these introductory allegations by the page number of Defendant’s pleading rather than paragraph number.

⁴ The Hospital Service Commitments address emergency services, oncology services, behavioral health treatment, cardiac services, general medicine services, imaging and diagnostic services, neuro trauma services, pediatric services, obstetrical services, surgical services, graduate medical education, geriatric care services, inpatient and outpatient rehabilitation services, orthotics and prosthetics services, home health and private duty nursing, hospice care, and pediatric specialty outpatient services. (APA Schedule 7.13(a).)

emergency services and oncology services that were provided at Mission as of January 2019.” (Countercls. 47.)

12. On 31 January 2019, MH Master Holdings and Seller⁵ executed the APA, which included the Hospital Service Commitments and gave the Attorney General contractual enforcement rights under certain circumstances. (Countercls. ¶ 19.)

13. On 14 December 2023, the Attorney General, on behalf of the Dogwood Health Trust, filed this action against HCA⁶ for violations of the APA. The Attorney General alleges that HCA has failed to provide the requisite level of emergency and trauma care, as well as the oncology services required by the APA. (*See generally*, Am. Compl.) The case was designated as a complex business case the day it was filed and was then assigned to the undersigned. (ECF Nos. 1, 2.)

⁵ On behalf of the Mission Health System, the APA was executed by Mission Health System, Inc., Mission Hospital, Inc., Mission Medical Associates, Inc., Mission Imaging Services, LLC, Blue Ridge Regional Hospital, Inc., Transylvania Community Hospital, Inc., Angel Medical Center, Inc., MSJHS and CCP Joint Development Company, LLC d/b/a Asheville Specialty Hospital, the McDowell Hospital, Inc., Community CarePartners, Inc., Highlands-Cashiers Hospital, Inc., WNC CareSource, LLC, Avenu Health, Inc., McDowell Hospital Imaging Services, LLC, Transylvania Physician Services, Inc., Transylvania Services, Inc., Transylvania Hospital Imaging Services, LLC, Highlands-Cashiers Physician Services, Inc., the Eckerd Living Center LLC (collectively, the “Seller”).

⁶ The Attorney General has since amended his Complaint to supplement the Complaint’s factual allegations and remove two Defendants from the action. (Order on Pl.’s Mot. Leave Am. Compl. and Defs.’ Mot. Grant Leave Am. Compl. and Set Deadlines Responsive Pleadings, ECF No. 49; First Am. Compl., ECF No. 50.) In addition, the parties stipulated to the dismissal of three other Defendants from this action, leaving MH Master Holdings, LLLP, referenced herein as either MH Master Holdings or HCA, as the sole Defendant in the Attorney General’s suit. (Parties’ Stip. Facts and Vol. Dismissal Non-Signatory Defendants, ECF No. 58.)

14. On 6 May 2024, HCA filed its Answer, along with two counterclaims. The counterclaims request that the Court enter a judgment interpreting the APA and declaring (1) that HCA has not breached APA Section 7.13(a) because it has not discontinued the oncology or emergency and trauma services required by the APA; (2) that Section 7.13 of the APA requires only that HCA “continue to make its facilities, staff and equipment available to medical staff physicians who want to use those facilities to offer the same services [listed in Schedule 7.13(a)] that Mission offered before HCA acquired it[.]” and (3) that Section 7.13(a) of the APA does not obligate HCA “to employ any particular number of providers.” (*See generally* Countercls. ¶¶ 82-87, ad damnum clause C, D, E.) HCA also requests that the costs of this action, including attorneys’ fees, be taxed against the Attorney General. (Countercls., ad damnum clause F.)

15. On 6 June 2024, Plaintiff filed the Motion seeking an order dismissing HCA’s counterclaims for lack of jurisdiction on sovereign immunity grounds pursuant to Rule 12(b)(1) or 12(b)(2) of the North Carolina Rules of Civil Procedure (the “Rule[s]”). (Mot. 1.) In the alternative, Plaintiff requests a partial motion to dismiss Defendant’s request for attorneys’ fees for failure to state a claim under Rule 12(b)(6). (Mot. 1.)

16. After full briefing, on 28 August 2024, the Court held a hearing on the Motion during which both parties were present and heard. The Motion is now ripe for disposition.

II. CONCLUSIONS OF LAW

A. Sovereign Immunity

17. “It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued[.]” *Zimmer v. N.C. Dep’t of Transp.*, 87 N.C. App. 132, 134 (1987) (citation omitted), “or upon its waiver of immunity, and that this immunity is absolute and unqualified.” *Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 534 (1983) (emphasis in original) (citations omitted).

18. A suit brought “against a public official in his official capacity ‘is a suit against the State.’ ” *White v. Trew*, 366 N.C. 360, 363 (2013) (quoting *Harwood v. Johnson*, 326 N.C. 231, 238 (1990)). Thus, public officials sued in their official capacity are, like the State itself, shielded by sovereign immunity. *Id.*

19. Waiver of sovereign immunity must be established at the outset of any action against the State or a State official. *Arrington v. Martinez*, 215 N.C. App. 252, 263 (2011). The burden of establishing waiver falls on the party bringing the action, in this case HCA. *Id.*

1. Application of Sovereign Immunity to the Attorney General

20. HCA rejects the contention that sovereign immunity applies because, it argues, this action was brought by the Attorney General, not in his state-sanctioned role, but on behalf of Dogwood Health Trust, a private, non-profit corporation. (Def. Mem. Opp’n Pl.’s Mot. Dismiss [“Def. Mem. Opp’n”] 9, ECF No. 63.) HCA maintains that when the Attorney General filed suit under the APA, he did not do so as the chief law enforcement officer of North Carolina, but rather he did so “on behalf of and in

the name of the Seller Representative” and as “a third-party beneficiary.” (Def. Mem. Opp’n 9.)

21. Plaintiff responds that when the Attorney General brings an action, including this one under the APA, he does so in his official capacity as North Carolina’s chief law enforcement officer. (Pl. Reply Def. Mem. Opp’n Pl. Mot. Dismiss [“Pl. Reply”] 2, ECF No. 64.) Plaintiff maintains that the APA’s protections and the right to enforce those protections were borne from the Attorney General’s statutory review authority and are consistent with his broad consumer protection mandate and his “common law right and power to protect the beneficiaries of charitable trusts.” (Pl. Reply 3.)

22. Underscoring its position, Plaintiff points to the language of the counterclaims. Defendant specifically pleads that “Counterclaim-Defendant Joshua H. Stein is sued in his official capacity as Attorney General for the State of North Carolina.” (Countercls. ¶ 5.)

23. Given HCA’s pleading, the Court concludes that Mr. Stein has been sued in his official capacity. Accordingly, he is entitled to sovereign immunity, unless that immunity has been waived. *White*, 366 N.C. at 363.

2. Waiver

24. HCA must affirmatively allege waiver of sovereign immunity. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 210 (2014); *Arrington*, 215 N.C. App. at 263. However, “[p]recise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain

sufficient allegations to provide a reasonable forecast of waiver.” *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 587 (2013) (citations and internal quotation marks omitted). Therefore, although particularity is not required, a complaint failing even generally to allege waiver is subject to dismissal. *Arrington*, 215 N.C. App. at 263; *see also Hinson*, 232 N.C. App. at 210.

a. Express Waiver

25. HCA has failed to allege express waiver. Even absent such an allegation, however, the Court may infer waiver from Defendant’s allegations, keeping in mind that “[w]aiver of sovereign immunity may not be lightly inferred[.]” *Meyer v. Walls*, 347 N.C. 97, 104 (1997) (quoting *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, (1983)).

b. Implicit Waiver by Contract

26. The North Carolina Supreme Court has held that the State waives sovereign immunity when it becomes a signatory to a private contract. *Smith v. State*, 289 N.C. 303, 320 (1976). In *Smith*, the North Carolina Supreme Court articulated five policy considerations underlying its recognition of this implied waiver:

- (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process;
- (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny;
- (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body “bad faith and shoddiness” foreign to a democratic government;
- (4) A citizen's

petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Id. at 320.

27. The Supreme Court concluded, “[i]t cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation.” *Id.* at 315.

28. Plaintiff alleges that neither the Attorney General nor the State is a signatory to the APA, the only contract at issue in this case. Therefore, Plaintiff argues, there can be no waiver of sovereign immunity based on contract. (Pl. Mem. Supp. Mot. [“Pl. Mem. Supp.”] 9, ECF No. 60.) Plaintiff adds that the public policy rationale for waiving sovereign immunity, as explained in *Smith*, is not present here because the State is not obligated under the APA to provide consideration to any of the contracting parties. (Pl. Mem. Supp. 9-10.)

29. Conversely, Defendant contends that the Attorney General negotiated for and secured the right to enforce certain APA obligations as a “third-party beneficiary” and therefore the State and Attorney General should be treated as parties to the contract, effecting a waiver of sovereign immunity. (Def. Br. Opp’n 12.)

30. The Court concludes that the Attorney General’s unique position under the terms of this APA does not give rise to the policy concerns that resulted in the waiver of sovereign immunity in *Smith*. Here, the State has not undertaken an

obligation that it is trying to avoid by claiming immunity from suit. The Attorney General's role in this case, resulting from the exercise of his authority pursuant to N.C.G.S. §55A-12-02(g) and consistent with his official role generally, is one of enforcement. The fact that his role was written into the contract does not result in an implicit waiver of governmental immunity. *See Smith*, 289 N.C. at 417 ("In order to impose a contractual liability on the state, there must be a contract obligation on its part").

c. Implicit Waiver - Declaratory Judgment Act

31. Citing *Can Am S., LLC v. State*, 234 N.C. App. 119 (2014), Defendant argues that sovereign immunity is waived because the claims at issue seek declarations of the parties' rights and obligations under the APA. (Def. Br. Opp'n 14.) Plaintiff responds that Defendant's claims for declaratory relief do not give rise to waiver because they are merely a denial of Plaintiff's claims coupled with a flawed attempt to secure advisory rulings from the Court on issues outside the scope of the underlying dispute. (Pl. Reply 10.)

32. The Court agrees. Asserting a cause of action against the State pursuant to the Declaratory Judgment Act (the "Act"), N.C.G.S. §§ 1-253 et seq., does not necessarily result in a waiver of sovereign immunity. Rather, whether sovereign immunity is waived turns on the nature of the dispute. *Compare Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 547 (2008) (holding that sovereign immunity was not waived in a declaratory judgment action to determine whether a statutorily authorized bidding fee violated the North Carolina Constitution) *with Can Am S.*,

234 N.C. App. at 127 (holding that sovereign immunity was waived in a declaratory judgment action involving lease agreements between the State and a private parties) and *T & A Amusements, LLC v. McCrory*, 251 N.C. App. 904, 908 (2017) (holding that sovereign immunity was waived in declaratory judgment action involving allegations that State agency acted in excess of the authority granted by statute).

33. Here, Plaintiff is exercising his ability to enforce certain provisions of the APA in the manner contemplated by the parties to the APA, including HCA. As stated above, the policy considerations identified in Smith that would support a waiver of sovereign immunity are not present. The fact that Defendant's claims are brought under the Act does not change that result.

34. Accordingly, the Motion shall be **GRANTED** on sovereign immunity grounds, and Defendant's counterclaims shall be dismissed for lack of *in personam* jurisdiction.

35. Even were this not the case, to the extent Defendant's claims for declaratory judgment exceed the scope of the pending controversy, they are subject to dismissal pursuant to Rule 12(b)(1). The Act grants a court the authority to "declare rights, status, and other legal relations," but only when an "actual controversy" exists between parties to a lawsuit. *Pine Knoll Shores v. Carolina Water Serv., Inc.*, 128 N.C. App. 321 (1998). See *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583 (1986) ("Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a

requirement.”). The “[m]ere apprehension or the mere threat of an action or a suit is not enough.” *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234 (1984). The Act “does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.” *Tryon v. Duke Power Co.*, 222 N.C. 200, 204 (1942).

36. Defendant argues that it seeks “broad declarations regarding the correct interpretation of Section 7.13(a), so that, moving forward, judicial resources need not be wasted on *similar* disputes” (Def.s’ Mem. 15, emphasis added) and says that its counterclaims “are broader [than Plaintiff’s] and seek declarations that will govern the parties’ *prospective* relationship.” (Def.s’ Mem. 16, emphasis added.) But as this Court has previously stated, “[t]o advise on what path a litigant should take in future proceedings falls squarely within the definition of an impermissible advisory opinion. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, 2016 NCBC LEXIS 49, at *6-7 (N.C. Super. Ct. June 24, 2016) (citing *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243 (1960)) (“The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.”).

37. In addition, to the extent Defendant’s declaratory judgment claims present no new controversies and simply amount to the converse of Plaintiff’s declaratory judgment claims already pending before the Court, the Court concludes,

in its discretion, that allowing Defendant's claims to proceed would not serve a useful purpose and would "conflict with the interests of judicial economy and efficiency." *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 580 (2000); *see also Augur v. Augur*, 356 N.C. 582, 588 (2002) ("[S]ection 1-257 permits a trial court, in the exercise of its discretion, to decline a request for declaratory relief when . . . the requested declaration will serve no useful purpose in clarifying or settling the legal relations at issue[.]"); *cf. Williams v. Hmaidan Holdings, LLC* 2024 Tex. App. LEXIS 2949 (Ap. 30, 2024) (holding that declaratory judgment counterclaim that was "merely a defensive mirror" was not a valid claim).

B. HCA's Request for Attorneys' Fees

38. Plaintiff next moves for dismissal of HCA's request that costs, "including attorney's fees as may be allowed by law, be taxed to the Attorney General." (Countercls. 82.) Plaintiff contends that HCA has failed to state a claim that would support this result. (Pl. Mem. Supp. 11.)

39. North Carolina law allows for the award of reasonable attorneys' fees to the prevailing party in "any civil action . . . if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C.G.S. § 6-21.5.

40. At this early stage, the Court concludes that the issue is not ripe for determination and therefore **DENIES** this aspect of Plaintiff's Motion, without prejudice.

III. CONCLUSION

41. **WHEREFORE**, Counterclaim–Defendant’s Motion to Dismiss is **GRANTED in part** and **DENIED in part**, as follows:

- a. The Motion to Dismiss Defendant’s Counterclaims is hereby **GRANTED**, and Defendant’s Counterclaims are dismissed with prejudice; and
- b. The Motion to Dismiss Defendant’s request for attorneys’ fees is hereby **DENIED**, without prejudice.

IT IS SO ORDERED, this the 6th day of December, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases