

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

05 CVS 8378

DELMA BLINSON, JERRY R. JOHNSON,
KELLIENE FISHER, DONALD R. REID,
BRIAN GOSSAGE, WILFORD R. DOWE,
and KENT MISEGADES,

Plaintiffs

v.

STATE OF NORTH CAROLINA;
JAMES T. FAIN, III, Secretary of the N.C. Dept.
of Commerce, in his official capacity; CITY OF
WINSTON-SALEM, North Carolina and
ALLEN JOINES, Mayor of Winston-Salem, in
his official capacity; FORSYTH COUNTY,
North Carolina and GLORIA D. WHISENHUNT,
Chairperson of the Board of Commissioners of
Forsyth County, in her official capacity; THE
MILLENNIUM FUND; WINSTON-SALEM
BUSINESS, INC.; THE WINSTON-SALEM
ALLIANCE; and DELL, Inc.,

Defendants

FILED
MAY 12 AM 9:37
CLERK OF SUPERIOR COURT

ORDER

This civil action for declaratory and injunctive relief seeks to prohibit the State of North Carolina, the County of Forsyth, the City of Winston-Salem, the Millennium Fund, Winston-Salem Business, Inc., the Winston-Salem Alliance and Dell, Inc. from providing alleged unconstitutional economic incentives to Dell, Inc. The action arises out of legislation adopted by the North Carolina General Assembly on November 4, 2004 to encourage Dell to build a manufacturing plant in the Triad area of North Carolina ("Dell Legislation"). Subsequently, the County of Forsyth and City of Winston-Salem adopted local resolutions agreeing to provide Dell with more than \$37,000,000.00 in various financial incentives to encourage Dell to locate its facility within Forsyth County.

Plaintiffs are seven North Carolina citizens suing in their individual capacities as residents and taxpayers in North Carolina. Plaintiff Wilford Dowe is a resident and taxpayer of Winston-Salem and Forsyth County, and Plaintiff Jerry Johnson is a resident and taxpayer of Forsyth County, North Carolina. The remainder of the Plaintiffs live and pay taxes in various other counties in North Carolina.

The named Defendants are divided into three groups. (1) the State of North Carolina and Secretary of the North Carolina Department of Commerce, James T. Fain, III, in his official capacity; (2) Dell and; (3) the City of Winston-Salem; Allen Joines, Mayor of Winston-Salem, in his official capacity; Forsyth County; Gloria D. Whisenhunt, Chairperson of the Board of Commissioners of Forsyth County, in her official capacity; The Millennium Fund; Winston-Salem Business, Inc.; and the Winston-Salem Alliance, known collectively as the "Local Defendants".

Each of the three groups of Defendants filed a separate Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

Robert F. Orr, Pamela B. Cashwell, and Jeanette Doran Brooks of the North Carolina Institute for Constitutional Law appeared on behalf of the seven Plaintiffs. Grayson G. Kelly, Norma S. Harrell, and John F. Madrey, all of the Attorney General's office, appeared on behalf of the Defendants State of North Carolina and James T. Fain, III, in his official capacity as Secretary of the North Carolina Department of Commerce. J. Robert Elster and Adam H. Charnes appeared on behalf of the Defendants City of Winston-Salem, Forsyth County, and non-profit business entities. Ronald G. Seeber, Winston-Salem City Attorney, appeared for the City of Winston-Salem and Mayor Allen Joines. Davida W. Martin, Forsyth County attorney, appeared on behalf of Forsyth County and Chairperson Gloria D. Whisenhunt. Burley Mitchell,

Jr., Pressly M. Millen, Sean E. Andrussier, and Melody C. Ray-Welborn of Womble Carlyle Sandridge & Rice, PLLC appeared on behalf of Dell, Inc., together with Michael Carvin of Washington, D.C.

FINDINGS OF FACT

1. The General Assembly in the 2004 Extra Session on November 4, 2004 enacted Session Law 2004-204, Article 3G, Tax Incentives for Major Computer Manufacturing Facilities. North Carolina General Statute § 105-129-60(1), (2), (3), (4), (5), (6) & (7), which are incorporated by reference herein, set forth the public policy of the State of North Carolina with regard to stimulating economic activity and creating and maintaining sustainable jobs for the citizens of North Carolina in strategically important industries such as computer manufacturing and distribution.
2. The use of public funds by local governments to enhance economic growth in local communities is permitted by N.C. Gen. Stat. § 158-7.1, which gives broad latitude to local governments to decide the nature and scope of economic development incentives designed to bring jobs and economic growth to local communities.
3. The Forsyth County Commissioners adopted a county resolution December 20, 2004, as amended on July 25, 2005, approving up to \$14,760,000.00 in economic incentives to Dell over 15 years. These incentives are contingent upon Dell making capital investments in buildings and equipment of \$100,000,000.00 over five years and creating 1,700 new full-time jobs during that period.
4. The City of Winston-Salem's resolution adopted on December 20, 2004, as amended on July 18, 2005, approved an incentive package that potentially totals \$22,426,250.00, also

conditioned on Dell investing a minimum of \$100,000,000.00 and creating at least 1,700 local qualified jobs at an average wage of \$28,000.00.

5. Pursuant to these resolutions, the "Agreement for Job Creation and Economic Development in Winston-Salem and Forsyth County, North Carolina" was entered into by the Local Government Defendants, the non-profit Defendants, and Dell. The agreement requires that the annual incentive grants shall be expended only in accordance with N.C. Gen. Stat. § 158-7.1.

6. Without question, the "Dell Legislation" and the local government resolutions and agreement enticed Dell to build and operate a new computer manufacturing facility in Forsyth County, North Carolina. However, the legislation is not limited to Dell and permits tax credits and incentives to any qualifying major computer manufacturer.

7. Attracting jobs to a community by public economic incentives provides a direct general economic welfare and benefit to the people of those communities in addition to the direct benefits received by a private entity receiving those public economic incentives.

8. The Amended Complaint specifically challenges the constitutionality of the state and local tax incentives to promote economic development. This issue is a political question best addressed to the legislature. The legislature sets the policy of the State.

9. This Court acknowledges that the United States Supreme Court heard arguments in a tax incentive case, *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), cert. granted, ___ U.S. ___, 126 S.Ct. 36 (2005), but has not issued an opinion as of May 10, 2006.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear this case.
2. This Court was assigned to hear this case by virtue of a Rule 2.1 designation of Chief Justice Beverly Lake, Jr. (now retired).
3. The Local Defendants have agreed to hold in abeyance their Motion to Transfer Venue to Forsyth County pending ruling on these motions.
4. Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) Motion to Dismiss. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).
5. The Court in considering the Defendants' Motions to Dismiss under Rule 12(b)(6) must accept the well-pleaded factual allegations of Plaintiffs' Amended Complaint as true.
6. The determination of whether a particular function or activity constitutes a public purpose is a legal issue to be decided by the Court. *Peacock v. Shinn*, 139 N.C. App. 487, 492, 533 S.E.2d 842, 846 (2000) (quoting *Madison Cablevision Inc. v. City of Morganton*, 325 N.C. 634, 653, 386 S.E.2d 200, 211 (1989)).
7. The Supreme Court of North Carolina has upheld the constitutionality of N.C. Gen. Stat. § 158-7.1 and has approved the appropriateness of economic development incentives granted by municipalities and counties and held that the expenditure of local public funds for economic incentive grants did not violate the public purpose requirement of Article 5, section 2(1) of the North Carolina Constitution. Stimulation of the economy involves a public purpose. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

8. The Amended Complaint is devoid of allegations sufficiently particular to give the non-profit Defendants notice of the claims against them. The non-profit Defendants are not state actors. The non-profit Defendants cannot be sued for violating the North Carolina Constitution. The conclusory allegation in the Amended Complaint that the non-profit Defendants are agents of the City, County and State is not supported by any factual allegations sufficient to withstand a Motion to Dismiss. *See Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880 (1997) (Orr, J.) A conclusory allegation that a public official acted willfully and wantonly would not be sufficient by itself to withstand a 12(b)(6) Motion to Dismiss.

9. Conclusory allegations in a complaint unsupported by factual allegations are not sufficient by themselves to withstand a 12(b)(6) Motion to Dismiss.

10. A court may not invalidate legislation on constitutional grounds unless the court concludes that the Constitution unmistakably prohibits the act beyond a reasonable doubt.

Applying the Findings of Fact and Conclusions of Law to each count in the Amended Complaint and accepting the factual allegations in each count as true, the Court addresses each specific count as follows:

Counts 1, 2, and 3: The Plaintiffs have the burden of proving that they have standing but have not alleged any way that they have been personally harmed or will be harmed by any Commerce Clause violations they contend exist as a result of Chapter 204. Because standing is a jurisdictional prerequisite, Plaintiffs' inability to establish standing is fatal to their claim. Without some direct personal connection to any Commerce Clause harm they allege exists, the Plaintiffs cannot rely on the theory that the incentives they challenge violate the Commerce Clause. The Plaintiffs do not have standing to contest the major computer manufacturing credit

(Count 1), the enhanced Bill Lee Act credits (Count 2), and the sales and use tax refund (Count 3) as being in violation of the Commerce Clause of Article 1, section 8 of the United States Constitution. Counts 1, 2, and 3 of the Amended Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of standing.

Further, the negative Commerce Clause protects interstate commerce against discriminatory or burdensome treatment by the States. The State of North Carolina has not burdened, discriminated against, restricted, limited, or restrained interstate commerce in any way by providing these economic incentives. Counts 1, 2, and 3 of the Amended Complaint should be dismissed pursuant to Rule 12(b)(6).

Counts 4, 5, and 7: The Plaintiffs cannot establish and do not assert in Counts 4, 5, and 7 of the Amended Complaint that they have individually suffered from the inequities which they allege exist. The Plaintiffs do not have standing to litigate equal protection claims because they are not corporate taxpayers, they are not computer manufacturers, and do not belong to a class prejudiced by this statute. Counts 4, 5, and 7 of the Amended Complaint should be dismissed pursuant to Rule 12(b)(1) for lack of standing.

The major computer manufacturing credit and the amendments to the Bill Lee Act do not violate the Equal Protection Clause of the United States Constitution. The actions of the North Carolina General Assembly in this legislation are rationally related to legitimate governing purposes. The United States Supreme Court has recognized in the equal protection context that state legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequality. *McGowan v. Maryland*, 366 US 420, 425-26, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). North Carolina General Statute § 105-

129.60(1)-(7) provides the rational basis for the state tax incentives offered to major computer manufacturers. Counts 4 and 5 should be dismissed pursuant to Rule 12(b)(6).

Count 6: The Plaintiffs allege in Count 6 of the Amended Complaint that their rights, privileges, and immunities under the Commerce Clause and Equal Protection Clauses of the United States Constitution have been denied in violation of 42 U.S. Code §1983. Section 1983 creates no substantive rights in and of itself. Rather it is a vehicle for enforcing federally protected rights derived from other sources. Because Counts 1 through 5 have been dismissed the Plaintiffs' Section 1983 action cannot survive.

Further, Plaintiffs' federal claims brought under 42 U.S.C. § 1983 must be dismissed because the State is not a person for purposes of § 1983's provisions governing who can be sued. Count 6 should be dismissed pursuant to Rule 12(b)(6).

A claim under 42 U.S.C. § 1983 lies only for a violation of federal law. None of the federal claims which relate only to N.C. Gen. Stat. § 105-129.63 and the claims against the State Defendants are asserted against the Local Government Defendants and the non-profit Defendants. Count 6 should be dismissed against the Local Government and non-profit Defendants pursuant to Rule 12(b)(6).

Count 8: Under the enhancements of Section 2 of the "Dell Legislation," Dell would receive all of the benefits of locating in a Tier 1 county or development zone despite its location in Forsyth County, a Tier 5 county under the Bill Lee Act. While this may be arbitrary, it is not irrational. In any event, the Plaintiffs herein do not have standing to assert an equal protection, due process or law of the land claim on this allegation. Count 8 should be dismissed pursuant to Rule 12(b)(1).

Count 9: Count 9 alleges "by allowing the Secretary of Commerce to determine whether a taxpayer will receive tax credits and by failing to require a forfeiture of funds when Dell does not produce the expected jobs or make the expected investment, the North Carolina General Assembly has delegated its taxing authority to the executive branch in violation of Article 5, section 2(3) and violated the separation of powers clause of Article 1, section 6 of the North Carolina Constitution." The Plaintiffs have no standing to assert this claim. They cannot show that they suffer any direct harm. Count 9 should be dismissed pursuant to Rule 12(b)(1).

The major computer manufacturing credit is set out in the new Article 3G of Chapter 125, N.C. Gen. Stat. § 125-129.60, *et seq.* The statutes specify both the conditions which a taxpayer must meet to qualify for the credit and the amount of the credit itself. N.C. Gen. Stat. §§ 105-129.62, 105-129.64-65 (2005). The only thing that the Secretary of Commerce does is consider applications for the credit and determine whether an applicant has met the criteria. N.C. Gen. Stat. §§ 105-129.62 (a), 105-129.63 (2005). The Plaintiffs' claim in Count 9 fails because Chapter 204 contains no delegation of taxing power of any sort, merely the imposition on the Secretary of Commerce of the responsibility to make an administrative determination. This does not violate the separation of powers doctrine. North Carolina General Statute § 105-129.63 does provide that credits previously taken are "forfeited" when the taxpayer fails to create the required number of jobs to make the required investments. Count 9 should be dismissed pursuant to Rule 12(b)(6).

Count 10: The Plaintiffs in Count 10 allege that "the Dell Legislation" violates Article 1, section 32 of the North Carolina Constitution in that the preferential benefits, tax credits, grants and/or subsidies provided to Dell pursuant to this legislation accrued to Dell's private financial benefit and to the shareholders of Dell and thus are exclusive and separate.

emoluments not in exchange for any public service. The Plaintiffs also contend that Dell is provided a special tax benefit merely for operating its own private business. The Plaintiffs lack standing to challenge the incentives as exclusive emoluments. Count 10 should be dismissed pursuant to Rule 12(b)(1).

A plaintiff raising an exclusive emolument challenge loses if (1) the benefit is intended to promote the general welfare and (2) there is a reasonable basis for the government to conclude that granting the benefit will serve the public interest. *Town of Highland v. Hendricks*, 164 N.C. App. 474, 479-80, 596 S.E.2d 440, 445, *rev. denied*, 359 N.C. 75, 605 S.E.2d 149 (2004). *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (2000). This is referred to as the public interest test. The Plaintiffs cannot meet the public interest test. These benefits are all provided for a public purpose. Count 10 should be dismissed pursuant to Rule 12(b)(6).

Counts 11 and 13: No Plaintiff alleges any personal harm or stake in the outcome of this litigation which would entitle that Plaintiff to proceed with this action. Because the Plaintiffs have shown only such interest as is shared generally by all residents, citizens and taxpayers of the State, they fail to show that individual interest which is requisite for standing in order to raise their public purpose claims. Counts 11 and 13 should be dismissed pursuant to Rule 12(b)(1).

The "Dell Legislation" does not violate Article 5, section 2(1) or Article 5, section 7 of the North Carolina Constitution. The incentive provisions challenged are for public purposes. The fact that Dell also benefits from these stated enactments or local resolutions and agreements cannot change the reality that the governmental entities acted for a public purpose. *Maready*, 342 N.C. at 725, 467 S.E.2d at 626; *Peacock v. Shinn*, 139 N.C. App. 487, 494, 533 S.E.2d 842,

847, *disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). Counts 11 and 13 should be dismissed pursuant to Rule 12(b)(6).

Count 12: The Plaintiffs allege in Count 12 that the "Dell Legislation" violates Article 5, section 2(2) of the North Carolina Constitution in that the refund or credit of taxes to Dell violates the requirement of the uniformity of taxation within classifications and was not enacted by general law nor is it uniformly applicable to all businesses in every county, city, and town and other units of local government in that the legislation was specifically enacted for the benefit of Dell and for its location in the Triad area of North Carolina.

The Plaintiffs lack standing because they are not within the class that they contend is being treated unequally, the class of major computer manufacturing facilities. Count 12 should be dismissed pursuant to Rule 12(b)(1).

The legislature has the power to classify the subjects of taxation for the purposes of prescribing a different rule of taxation for each class and of imposing upon such subjects falling within the several classes a different rate of taxation. *Clark v. Maxwell*, 197 N.C. 604, 606, 150 SE 190, 192 (1929). The power of the legislature in the matter of classification is very broad and comprehensive subject only to the limitation that it must appear to have been made upon some reasonable ground. Courts have no right to weigh and determine legislative wisdom in selecting one class rather than another. *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 133, 118 S.E.2d 543, 546 (1961). When reviewing the General Assembly's determination of a classification for taxation the widest possible latitude must be accorded to the legislature in making the distinctions which are the basis for classification and they will not be disturbed unless capricious, arbitrary and

unjustified by reason. *Deadwood, Inc. v. N.C. Dept. of Revenue*, 356 N.C. 407, 411, 572 S.E.2d 103, 106 (2002). Count 12 should be dismissed pursuant to Rule 12(b)(6).

Counts 14 and 15: The Plaintiffs do not have standing to assert their claims in Counts 14 and 15 and they should be dismissed pursuant to Rule 12 (b)(1).

The "Dell Legislation," Chapter 204, does not violate the Article 5, section 2(1) of the North Carolina Constitution prohibition on surrendering, suspending, or contracting away the power of taxation. The granting of tax credits and sales tax refunds is not the same thing as relinquishing the power of taxation. Article 5, section 2(1) allows the State to make contracts for tax exemptions, even permanent tax exemptions, without impermissibly contracting away the power of taxation so long as there is a public purpose. *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). Because the Constitution does not forbid the State to contract for permanent tax exemptions it follows that the Constitution does not forbid tax credits enacted for a public purpose. The State has not contracted away its taxing power. Count 14 should be dismissed pursuant to Rule 12(b)(6).

The major computer manufacturing credit is not vague or ambiguous. The standards are very specific. North Carolina General Statute § 105-129.62 contains detailed and complicated provisions for calculation of the credit itself, any carryover and make-up credit, and a cap in the amount claimed in a particular year. Count 15 should be dismissed pursuant to Rule 12(b)(6).

Count 16: Standing. The Plaintiffs lack standing to assert equal protection claims against the Local Government Defendants. None of the Plaintiffs fall within the class of those adversely affected by the resolutions, namely those who create new jobs or expand businesses in

the Winston-Salem, Forsyth County area. Count 16 of the Amended Complaint should be dismissed pursuant to Rule 12(b)(1).

Counts 17 -21. Standing.

Since none of the Plaintiffs fall within the class of those adversely affected by the resolutions, Counts 17 – 21 of the Amended Complaint should be dismissed pursuant to rule 12(b)(1).

Count 16: The Plaintiffs do not belong to a suspect class. The creation of jobs and improvement of the economic welfare in Winston-Salem and Forsyth County establish a rational basis for the economic development incentives created by the city and county resolutions and agreement. By meeting the rational basis test, there can be no violation of the right to equal protection of the laws and due process guaranteed by the Equal Protection Clause and the Law of the Land Clause of Article 1, section 19 of the North Carolina Constitution. Count 16 should be dismissed pursuant to Rule 12(b)(6).

Count 17: The economic incentive benefits are intended to promote the general economic welfare of Winston-Salem and Forsyth County by the creation of jobs. The fact that Dell will also derive economic benefit in the form of land improvements thereon, road work and other structural work, and property tax rebates fails as a matter of law to establish a violation of the exclusive emoluments clause of Article 1, section 32 of the North Carolina Constitution. Count 17 should be dismissed pursuant to Rule 12(b)(6).

Count 18: The determination of when a particular function or activity constitutes a public purpose is a legal issue to be decided by the Court. *Peacock v. Shim*, 139 N.C. App. 487, 492, 533 S.E.2d 842, 846 (2000) (quoting *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 653, 386 S.E.2d 200, 211 (1989)). The Supreme Court of North Carolina has upheld the constitutionality of N.C. Gen. Stat. § 158-7.1 and has approved the appropriateness of economic development incentives granted by municipalities and counties and held that the expenditure of local public funds for economic incentive grants did not violate the public purpose requirements of Article 5, section 2(1) of the North Carolina Constitution. Stimulation of the economy involves a public purpose. Count 18 of the Amended Complaint should be dismissed pursuant to Rule 12(b)(6).

Count 19: The economic development incentives do not constitute tax rebates and do not surrender, suspend, or contract away the taxing authorities of the City of Winston-Salem and Forsyth County and do not violate Article 5, section 2(1) of the North Carolina Constitution. Count 19 should be dismissed pursuant to Rule 12(b)(6).

Count 20: The Amended Complaint discloses the fact that the city and county resolutions were promptly authorized by the Winston-Salem City Council and the Forsyth County Board of Commissioners pursuant to statutory procedures. Thus, the Complaint discloses facts that necessarily defeat the claim of a violation of Article 5, section 7 of the North Carolina Constitution. Count 20 should be dismissed pursuant to Rule 12(b)(6).

Count 21: The economic development incentives in the city and county resolutions and N.C. Gen. Stat. § 105-129.60, *et seq.*, are authorized by N.C. Gen. Stat. § 158-7.1. Count 21 should be dismissed pursuant to Rule 12(b)(6).

Count 22: Count 22, a claim for declaratory relief, is wholly derivative of the other causes of action alleged in the Amended Complaint. Having dismissed the other claims against the Local Government and the non-profit Defendants, there remains no real and justiciable controversy between the parties that would support this Court's jurisdiction over Count 22. The same applies as to the State Defendants and Dell. Count 22 should be dismissed as to the State Defendants, the Local Government Defendants, the non-profit Defendants, and Dell pursuant to Rule 12(b)(6).

WHEREFORE it is ORDERED that Counts 1 - 5 and 7 - 21 of the Plaintiffs' Amended Complaint are dismissed as against all Defendants pursuant to Rule 12(b)(1) and that Counts 1 - 6 and 9 - 22 of the Plaintiffs' Amended Complaint are dismissed as to all Defendants pursuant to Rule 12(b)(6).

This the 10th day of May, 2006.



Robert H. Hobgood, Judge Presiding