

BLINSON v. STATE

05 CVS 8378

SUPERIOR COURT OF NORTH CAROLINA, WAKE COUNTY

June 23, 2005

Reporter

2005 NC Sup. Ct. Pleadings LEXIS 19 *

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. Department 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.

Type: Complaint

Counsel

[*1] Robert F. Orr (State Bar No. 6798), Pamela B. Cashwell (State Bar No. 19542), Raleigh, North Carolina, Attorneys for the Plaintiffs.

Title

COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT

Text

The plaintiffs, complaining of the defendants, allege and say,

INTRODUCTION

1. This action is brought pursuant to the Uniform Declaratory Judgment Act, [*N.C. Gen. Stat. §§ 1-253*](#) to challenge the constitutionality of certain tax benefits and other so-called economic incentives or subsidies

("subsidies") granted a private sector computer manufacturing corporation to induce it to bring some of its business operations to Winston-Salem, Forsyth County, North Carolina, as opposed to other sites in the United States.

2. This action arises from legislation adopted by the North Carolina General Assembly on November 4, 2004 providing several income, franchise and sales tax subsidies, as well as training, transportation infrastructure, and other direct grant assistance totaling more than \$ 242,000,000 designed to entice Dell, Inc. ("Dell") to build and operate a computer manufacturing facility in North Carolina's "Triad" region ("Dell legislation"). The Dell legislation discriminates in [*2] favor of in-state economic activity and against interstate commerce thereby violating the Commerce Clause of the United States Constitution and otherwise violates the U.S. Constitution and various provisions of the North Carolina Constitution.

3. This action further arises from the decisions of the City of Winston-Salem, North Carolina and Forsyth County, North Carolina to provide, upon information and belief more than \$ 37,000,000 in tax revenues, land, and infrastructure to entice Dell through discriminatory financial subsidies to locate a computer manufacturing facility in Winston-Salem, Forsyth County, North Carolina. The local government subsidies violate various provisions of the North Carolina Constitution.

PARTIES

(Plaintiffs)

Pursuant to the Uniform Declaratory Judgment Act, the following individuals are petitioning for a declaration as to the unconstitutionality of the legislation and resolutions at issue and for the purposes of this action are denominated as "plaintiffs":

4. Plaintiff Delma Blinson, individually is a citizen, resident, and taxpayer in Chocowinity, Beaufort County, North Carolina. At all times complained of, Blinson has owned real and [*3] personal property within Beaufort County, as well as Johnston County. The Counties impose ad valorem taxes on such property, which Blinson has paid each and every year that he has owned property and will continue to do so. Blinson's ad valorem tax rate has been based on a system of valuation, and he has received no abatement or exemption from this legal responsibility. In addition, plaintiff Blinson pays other types of taxes to these governmental entities including state and local sales taxes on items purchased as well as state income taxes.

5. Plaintiff Jerry R. Johnson, individually is a citizen, resident, and taxpayer in Forsyth County, North Carolina. At all times complained of, Johnson has owned real and personal property within the County. The County imposes ad valorem taxes on such property, which Johnson has paid each and every year that he has owned property and will continue to do so. Johnson's ad valorem tax rate has been based on a system of valuation, and he has received no abatement or exemption from this legal responsibility. In addition, plaintiff Johnson pays other types of taxes to these governmental entities including state and local sales taxes on items purchased [*4] as well as state income taxes.

6. Plaintiff Kelliene Fisher, individually is a citizen, resident, and taxpayer in East Bend, Yadkin County, North Carolina. At all times complained of, Fisher has owned real and personal property within the County. The County imposes ad valorem taxes on such property, which Fisher has paid each and every year that she has owned property and will continue to do so. Fisher's ad valorem tax rate has been based on a system of valuation, and she has received no abatement or exemption from this legal responsibility. In addition, plaintiff Fisher pays other types of taxes to these governmental entities including state and local sales taxes on items purchased as well as state income taxes.

7. Plaintiff Donald Reid, individually is a citizen, resident, and taxpayer in Charlotte, Mecklenburg County, North Carolina. At all times complained of, Reid has owned real and personal property within the City and County. The City and County impose ad valorem taxes on such property, which Reid has paid each and every year that he has owned property and will continue to do so. Reid's ad valorem tax rate has been based on a system of valuation,

and he has received no abatement [*5] or exemption from this legal responsibility. In addition, plaintiff Reid pays other types of taxes to these governmental entities including state and local sales taxes on items purchased as well as state income taxes.

8. Plaintiff Brian Gossage, individually is a citizen, resident, and taxpayer in Apex, Wake County, North Carolina. At all times complained of, Gossage has owned real and personal property within the Town and County. The Town and County impose ad valorem taxes on such property, which Gossage has paid each and every year that he has owned property and will continue to do so. Gossage's ad valorem tax rate has been based on a system of valuation, and he has received no abatement or exemption from this legal responsibility. In addition, plaintiff Gossage pays other types of taxes to these governmental entities including state and local sales taxes on items purchased as well as state income taxes.

9. Plaintiff Kent Misegades, individually is a citizen, resident, and taxpayer in Cary, Wake County, North Carolina. At all times complained of, Misegades has owned real and personal property within the City and County. The City and County impose ad valorem taxes on such property, [*6] which Misegades has paid each and every year that he has owned property and will continue to do so. Misegades' ad valorem tax rate has been based on a system of valuation, and he has received no abatement or exemption from this legal responsibility. In addition, plaintiff Misegades pays other types of taxes to these governmental entities including state and local sales taxes on items purchased as well as state income taxes.

10. Plaintiff Wilford R. Dowe, individually is a citizen, resident, and taxpayer in Winston-Salem, Forsyth County, North Carolina. At all times complained of, Dowe has owned real and personal property within the City and County. The City and County impose ad valorem taxes on such property, which Dowe has paid each and every year that he has owned property and will continue to do so. Dowe's ad valorem tax rate has been based on a system of valuation, and he has received no abatement or exemption from this legal responsibility. In addition, plaintiff Dowe pays other types of taxes to these governmental entities including state and local sales taxes on items purchased as well as state income taxes.

(Defendants)

Pursuant to N.C. Gen. Stat. § 1-260, the following [*7] are joined as parties who have an interest which would be affected by the declaration sought, and are for purposes of this action denominated as "defendants":

11. Defendant State of North Carolina is a general purpose state government which is capable of being sued, and which is being sued, for authorizing (through the General Assembly) and/or granting the tax subsidies and other economic development subsidies of which complaint is made.

12. Defendant James T. Fain, III is the Secretary of the North Carolina Department of Commerce ("the Secretary") and is responsible for promoting statewide economic development. Pursuant to N.C. Gen. Stat. § 105-129.3 and the William S. Lee Quality Jobs and Business Expansion Act (Session Law 1996-13es2, as amended) (Bill Lee Act). The Secretary is also responsible for assigning an economic distress tier designation to each of the 100 counties in the State and for designating areas of higher poverty within urban centers in the State as development zones, to allow for more favorable treatment for the taxpayer investing in those geographic areas, with respect to the wage standard, the credit for creating jobs, the credit for investing in machinery [*8] and equipment, and the credit for worker training under the Bill Lee Act.

13. Defendant Secretary is tasked under the Dell legislation with making a "written determination that the taxpayer has or is expected to have" reached threshold employment and investment levels that determine the taxpayer's eligibility for certain tax credits as outlined in the Dell legislation. N.C. Gen. Stat. § 105-129.62. The Secretary is sued in his official capacity only.

14. Defendant the City of Winston-Salem ("the City") is a public body with authority to sue and be sued in its own name. The City is duly authorized to impose ad valorem taxes on property located within its boundaries. The Winston-Salem City Council ("the City Council") is the governing body of the City. As such, the Council comprises duly elected officials who are bound and governed by both the Constitution of the State of North Carolina and the North Carolina General Statutes. The City Council authorized the granting of discriminatory tax subsidies and/or direct grants related to the computer manufacturing facility for defendant Dell which were not allowed for Plaintiffs.

15. Defendant Allen Joines is Mayor of the City of Winston-Salem, [*9] North Carolina and in that capacity, upon information and belief has authorized and/or will authorize the granting of tax subsidies and/or direct grants related to the computer manufacturing facility for defendant Dell. As Mayor of the City, Joines is acting under color of state law and is sued in his official capacity.

16. Defendant Forsyth County ("the County") is a public body with authority to sue and be sued in its own name. It is duly authorized to, and does impose ad valorem taxes on property located within its respective boundaries. The Forsyth County Board of Commissioners ("County Commissioners") is the governing body of the County. As such, the County Commissioners comprise the duly elected officials who are bound and governed by both the Constitution of the State of North Carolina and the North Carolina General Statutes. The Commissioners authorized by resolution the granting of discriminatory tax subsidies and/or direct grants related to the computer manufacturing facility for defendant Dell which were not allowed for Plaintiffs.

17. Defendant Gloria D. Whisenhunt is Chairperson of the Forsyth County Board of Commissioners. In that capacity, upon information and belief, [*10] she has authorized and/or will authorize the granting of tax subsidies and/or direct grants related to the computer manufacturing facility for defendant Dell. As Chairperson of the Board of Commissioners, Whisenhunt is acting under color of state law and is sued in her official capacity only.

18. Defendant Dell, Inc. ("Dell") is a for-profit, duly chartered corporation in the State of Delaware, the North American headquarters of which is located in Round Rock, Texas. Dell and/or a Dell subsidiary is licensed to do business in North Carolina and will build or is building a manufacturing plant for the construction, assembly, and/or manufacture of computers in Forsyth County. Upon information and belief, Dell and/or a Dell subsidiary has been a corporate taxpayer in North Carolina annually since 1993.

19. Defendant Winston-Salem Business, Inc. ("WSBI"), originally chartered as the Winston-Salem Business Foundation, is a charitable or religious corporation as defined in Chapter 55 A of the North Carolina General Statutes and is a non-profit corporation, duly chartered in North Carolina and operating in Winston-Salem, Forsyth

County, North Carolina, for the purpose of purportedly promoting [*11] economic development in Winston-Salem. WSBI is exempt under [Section 501\(c\)\(3\) of the Internal Revenue Code of 1986](#), as amended.

20. Defendant The Millennium Fund ("Millennium Fund") is a charitable or religious corporation, as defined in Chapter 55A of the North Carolina General Statutes, and is a non-profit corporation duly chartered in North Carolina and operating in Winston-Salem, Forsyth County, North Carolina for the benefit of, or to carry out the purposes of the Winston-Salem Foundation, within the meaning of [Section 509\(a\)\(3\) of the Internal Revenue Code](#). The Millennium Fund is exempt under [Section 501\(c\)\(3\) of the Internal Revenue Code of 1986](#), as amended.

21. Defendant Winston-Salem Alliance ("Alliance") is a 501(c)(6) non-profit corporation, operating for the promotion of common business interests as defined in Chapter 55 A of the North Carolina General Statutes, duly chartered in North Carolina and currently operating in Winston-Salem, Forsyth County, North Carolina. Upon information and belief, Mayor Allen Joines is the President of the Alliance.

JURISDICTION AND VENUE

22. This action is brought pursuant to [N.C. Gen. Stat. § 1-253](#), the Uniform Declaratory [*12] Judgment Act, for the purpose of determining the constitutionality of certain actions of the State of North Carolina, the City, and the County. This Court has jurisdiction over the subject matter of this action pursuant to [N.C. Gen. Stat. § 1-253](#), the Uniform Declaratory Judgment Act.

23. This Court has jurisdiction over the parties pursuant to [N.C. Gen. Stat. § 1-75.4](#).

24. Venue is proper in this Court pursuant to [N.C. Gen. Stat. § 1-82](#).

FACTUAL BACKGROUND

Passage of Dell Legislation by General Assembly

25. On or about November 4, 2004, the North Carolina General Assembly met in a special session called by the Governor of the State of North Carolina, the Honorable Michael F. Easley on October 27, 2004. Upon information and belief, legislators received a copy of the legislation to

review on the day before the Special Session.

26. At this special one-day session, the General Assembly considered and passed the largest economic incentive package in North Carolina history: "Session Law 2004-204, Extra Session, Senate Bill 2: An Act to Provide a Tax Credit for Certain Major Computer Manufacturing Facilities and to Enhance Certain Existing Tax Incentives for those [*13] Facilities" ("Dell legislation"), with no amendments. In fact, upon information and belief, the Governor's representatives indicated several times during the limited debate on the legislation that any changes or amendments to the legislation as written would "break" or "kill" the deal.

27. The legislation provides several income, franchise and sales tax subsidies, as well as training, transportation infrastructure, and other direct grant assistance designed to entice the defendant, Dell, to build and operate a computer manufacturing facility in North Carolina's "Triad" region. While the legislation does not specifically reference Dell, it was acknowledged by representatives of the State of North Carolina during the debate on the legislation that the subsidies at issue were for the purpose of enticing Dell to locate a computer manufacturing facility in the Triad area of North Carolina, as opposed to another state. The legislation was in fact for the direct benefit of Dell alone.

28. The financial commitment included in the General Assembly's package totals at least \$ 242,480,000, which has been, or subsequently may be, granted, accorded, guaranteed, provided or otherwise made available [*14] to Dell as inducements to acquire, build, and operate a manufacturing facility in the Triad area, as opposed to another state.

29. The Dell legislation was signed into law by Governor Easley on or about November 5, 2004, a copy of which is attached as Exhibit A and incorporated by reference.

30. On or about November 9, 2004, Kevin Rollins, Dell's Chief Executive Officer and Governor Easley, jointly announced that Dell would locate a new manufacturing facility in "the Triad" area of North Carolina in the fall of 2005. Winston-Salem and Forsyth County are considered a part of the Triad. A copy of the press release from Governor Easley's office is attached as Exhibit B and incorporated by reference. This manufacturing facility is in the process of being built in Forsyth County.

The New Tax Credit for Major Computer Manufacturing Facilities

31. The Dell legislation created Article 3G of Chapter 105, Tax Incentives for Major Computer Manufacturing Facilities (codified at [N.C. Gen. Stat. § 105-129.60-66](#)). This part of the Dell legislation provides a new tax credit for large computer manufacturers against corporate income and corporate franchise taxes. The amount of the credit [*15] is based upon the computer manufacturing facility's unit output and employment level at the computer manufacturer's North Carolina manufacturing facility.

32. The taxpayer may claim a credit up to 100% of the taxpayer's corporate income and corporate franchise tax liability, plus additional credit amounts earned that may be carried forward. Most tax incentives under current law allow the taxpayer to offset no more than 50% of its tax liability.

33. Under this new legislation, Dell is expected to be provided tax credits by the State valued at over \$ 225,000,000 over 15 years. The provision includes a 25 year carry-forward for any unused portions of the credit that could mean that Dell will pay no corporate income or franchise taxes through 2044.

34. To qualify for the new tax credit, the Secretary must make a written determination that the taxpayer has employed or is expected to employ at least 1,200 new full time jobs or new permanent part-time jobs converted into full-time equivalences within five years after the North Carolina facility is operational. This legislation represents the first time that the State has allowed the taxpayer to meet the employment threshold requirements [*16] either directly or indirectly by including jobs created by one or more "related entities and strategic partners," as defined in the legislation. N.C. Gen. Stat. § 105-129.62.

35. The legislation also requires the Secretary to make a written determination that the taxpayer either "directly or indirectly through a related entity or strategic partner, has invested or is expected to invest" at least \$ 100,000,000 in private funds to construct a computer manufacturing and distribution facility in North Carolina over a five-year period. N.C. Gen. Stat. § 105-129.62.

36. Upon information and belief, Dell plans to use foreign profits to make this \$ 100,000,000 investment, thus securing a more favorable federal corporate tax rate.

37. The Secretary's determinations described in paragraphs 34 and 35 are questions of fact and must be made "in any case in which the taxpayer can demonstrate performance or can provide a credible plan for performance." N.C. Gen. Stat. § 105-129.63. Thus, if Dell does not make the required investment of funds and fails to produce the expected jobs as promised, Dell does not forfeit any of the tax credits already taken, unless the assertions made in Dell's application [*17] can be proved to have been false when made and further that the "person making the application knew or should have known that the information was false." N.C. Gen. Stat. § 105-129.63.

38. Pursuant to the legislation, unlike situations involving other similar tax credits offered by the State, Dell does not have to meet a wage standard to qualify for the credit.

39. The new major computer manufacturing tax credit provided by the Dell legislation is based in part on the maximum increased employment level ever attained by the taxpayer (including the qualified hires of related entities and strategic partners), as opposed to similar legislation like the Bill Lee Act which requires a credit to expire if the jobs receiving state tax credits are reduced in any given year.

40. Thus, once Dell has attained an increased employment level of at least 1,500 it may reduce its employment level by up to 40% per year without being subject to a reduction in the maximum amount of the tax credit for which it is eligible. As a result, Dell and another company having identical output and the same increased employment levels in a given year, may be eligible for substantially different tax credits based [*18] on Dell's increased employment level attained in an earlier year, thus providing Dell with more favorable tax treatment.

41. At the outset of the major computer manufacturing credit portion of the Dell legislation, the General Assembly stated, "It is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for the citizens of the State in strategically important industries." [N.C. Gen. Stat. § 105-129.60\(1\)](#).

42. Upon information and belief, at the time of filing this complaint, the State of North Carolina has not yet entered into, but is currently preparing, a written agreement with Dell setting forth the promises, obligations, consideration, etc. for implementing the provisions of the Dell legislation.

Enhancements to the Bill Lee Act for the Benefit of Dell

43. Section 2 of the Dell legislation amends N.C. Gen. Stat. § 105-129.4 of the Bill Lee Act by providing enhancements for "major computer facilities" in a new subsection (b7). The Bill Lee Act (Session Law 1996-13es2, as amended) allows a tax credit against the North Carolina corporation franchise tax, corporate income tax, personal income tax, estate and trust tax, or the [*19] gross premiums tax for investment in machinery and equipment and certain real property, job creation, worker training, and research and development that occurs in North Carolina. The Bill Lee Act was first adopted in 1996 for the purported purpose of encouraging investment in areas of the State that are less prosperous.

44. To accomplish the purposes of the Bill Lee Act, the Secretary of Commerce is charged with ranking all North Carolina counties annually into five economic distress tiers according to the county's economic status. The lower the tier of a county, the more favorable the tax incentive (one being the highest distressed county and five being the lowest distressed county). The Secretary has designated Forsyth County as a tier five county every year from 1996 through 2005 (See Exhibit C attached hereto and incorporated by reference).

45. The Dell legislation provides Dell with the tax credit benefits of locating in a tier one county although Forsyth County is designated by the Secretary as a tier five county.

46. All of the tax credits provided under the Bill Lee Act enhancements are allowed only for business activities occurring in North Carolina, but not for identical [*20] activities occurring out-of-state.

47. Under the Dell legislation, a taxpayer otherwise eligible for the Bill Lee Act credits and who is eligible for the new large computer manufacturer credit, discussed above, receive the following enhancements under the Bill Lee Act, regardless of the taxpayer's location choice within North Carolina:

- a) No wage standard applies, unlike with all other similar state tax credits.
- b) The jobs credit is increased by \$ 4,000 per eligible job, over that normally provided by the state, unless the site is located in a development zone.
- c) The investment threshold for the machinery and equipment tax credit is reduced to zero instead of \$

2,000,000 for a five tier county such as Forsyth.

d) The maximum worker training credit is \$ 1,000 per worker instead of the \$ 500 currently available in tiers two through five counties.

e) A real property investment tax credit of thirty percent (30%) is provided versus the current zero credit for tier three through five counties.

48. These changes noted above mean that under the Dell legislation, Dell will receive a \$ 4,500 tax credit for each full-time employee hired at their Forsyth facility, [*21] and Dell is not required to meet the wage standard applicable to other taxpayers seeking credits under the Bill Lee Act in Forsyth County. In addition, Dell will receive a tax credit for seven percent (7%) of their total investment in machinery and equipment placed in service in North Carolina. Dell will also receive a tax credit of up to \$ 1,000 per employee for worker training of five or more of its North Carolina employees.

49. The enhancements also provide Dell with a credit for "substantial investment in other property" under N.C. Gen. Stat. § 105-129.12A, which is currently only available for property in an economically distressed tier one or tier two county. The State uses N.C. Gen. Stat. § 105-129.12A to encourage investment in North Carolina at the expense of out-of-state investment and requires the creation and maintenance of new jobs in North Carolina, as opposed to any job creation out-of-state. To be eligible for the credit, a taxpayer must decide to invest in property in the State and also increase operations at the facility.

50. By means of amending N.C. Gen. Stat. § 105-129.4 in Section 2 of the Dell legislation, the State of North Carolina has provided Dell with [*22] a subsidy of at least \$ 21,000,000 in foregone tax revenues in order to induce Dell to build a facility in North Carolina, locate new manufacturing machinery and equipment at its facility, and hire employees to work in North Carolina.

Refund of Sales and Use Tax Provisions

51. Section 3 of the Dell legislation amends N.C. Gen. Stat. § 105-164(j)(2) and (3) relating to the refund of sales and use taxes paid on building materials, building supplies, fixtures, and equipment that becomes a part of real property located in North Carolina. To qualify for a refund of sales and use taxes, the taxpayer must normally invest at least \$ 100,000,000 in private funds to construct a facility in North Carolina.

52. As a special and singular dispensation to Dell, the legislation allows the taxpayer to meet the "private" investment requirement "either directly or indirectly through a related entity or strategic partner" and also adds "printers" to the items that can be manufactured at a facility to qualify a taxpayer as a "computer manufacturer" and thus eligible for the refund.

53. Eligibility requirements mandate that the project be located in North Carolina and that building materials [*23] be purchased in the State and used in this State. Thus, this provision discriminates in favor of in-state purchases for in-state use and against North Carolina taxpayers who purchase building materials in another state and use those materials in North Carolina.

54. This refund includes both the State and local sales and use taxes paid by the taxpayer. As a result, both the State and local governments, and consequently the State and local taxpayers are deprived of the benefits that would accrue absent such a refund to the taxpayer.

The Local Subsidies

55. On or about December 20, 2004, the County, by and through its duly elected Board of Commissioners adopted a resolution entitled: "Resolution Authorizing the Expenditure of County General Funds for an Economic Development Project and Authorizing Execution of an Agreement with Winston-Salem Business, Inc. and Dell, Inc.," ("County Resolution") approving and authorizing an economic development project to assist Dell in an amount up to \$ 14,760,000 from available revenues in the County's General Fund over a fifteen-year period.

56. Of the amount appropriated by the County Resolution, \$ 6,000,000 is for site preparation in the [*24] form of grading, paving, access road construction, public utilities, and storm water management on the Dell site; while \$ 8,760,000 is for annual cash subsidies over a fifteen-year period for "project purposes," which upon information and belief is for the purpose of reimbursing Dell for the property taxes due and paid by Dell, thus relieving Dell from county property tax liability for the fifteen year period. A copy of the County Resolution is attached hereto as Exhibit D and incorporated by reference herein.

57. The County further authorized the expenditure of \$ 3,500,000 in tax revenue as cash subsidies to aid and encourage Dell to locate its proposed plant in Forsyth

County and to be used for "any project purpose, including site acquisition." Upon information and belief this \$ 3,500,000 is for the purpose of aiding Dell in obtaining title to a 200 acre tract of land for the construction of its planned manufacturing plant without Dell having to pay for the land.

58. On or about December 20, 2004, the City, by and through its duly elected City Council adopted a resolution agreeing to provide Dell \$ 18,926,250 in economic development grants and to convey 209.388 acres of land in [*25] the Alliance Science and Technology Business Park to WSBI for site preparation and for the construction of a computer assembly plant for Dell. Upon information and belief, the fair market value of the aforementioned property is at least \$ 7,000,000. A copy of the resolution is attached as Exhibit E and incorporated by reference.

59. The subsidies authorized by the City for Dell included "Immediate Assistance for up to \$ 10 million for any upfront project costs." Upon information and belief, \$ 3.5 million of this amount is for the purpose of aiding Dell in gaining ownership of the aforementioned approximately 200 acre tract of land ("the site") in the Alliance Science and Technology Business Park without Dell having to pay for the land.

60. The subsidies authorized by the City also included "Long Term Assistance" representing \$ 8,426,250 in property tax refunds over a 15 year period, by which, upon information and belief, Dell would be refunded up to 100 percent of its property taxes paid to the City.

61. In total, the City and County agreed to provide at least \$ 37,000,000 in public funds and foregone tax revenue to Dell.

62. On December 22, 2004, Dell announced that it would build [*26] a North Carolina manufacturing facility in Winston-Salem, Forsyth County, North Carolina.

63. Upon information and belief, construction has begun on the site and a written agreement among Dell and a group consisting of the City, the County, WSBI, the Alliance and the Millennium Fund has been or will be signed setting out certain terms agreed to by those parties consistent with, but not limited to, the terms of the resolutions adopted by the City and the County.

The Dell legislation, the City and County Resolutions, and

any contracts resulting therefrom, are facially unconstitutional and unconstitutional as applied to each subsidy granted, as more specifically set forth below:

COMMERCE CLAUSE CLAIMS

Count 1 - United States Constitution

(Major Computer Manufacturing Credit Violates Commerce Clause)

64. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 63.

65. By means of creating [*N.C. Gen. Stat. § 105-129.60-66*](#) in Section 1 of the Dell legislation, the State of North Carolina has induced major computer manufacturing and distribution taxpayers (in this case Dell) to locate their economic activities [*27] in North Carolina, rather than in another state within the United States by conditioning favorable tax treatment on the corporations' decisions to locate new or expanded facilities and create jobs in locations within North Carolina and not elsewhere in the United States.

66. By providing a credit against the taxpayer's corporate income or corporate franchise taxes measured exclusively by business activities occurring in-state but not for identical activities that occur out-of-state, the new tax credit created in Section 1 confers preferential tax treatment on in-state businesses, thereby discriminating in favor of in-state business activity and against out-of-state activity, in violation of the restrictions imposed on discriminatory state taxation by the Commerce Clause of Art. I, § 8 of the U.S. Constitution.

Count 2 - United States Constitution

(Enhanced Bill Lee Act Credits Violate Commerce Clause)

67. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 66.

68. By means of amending *N.C. Gen. Stat. § 105-129.4* in Section 2 of the Dell legislation, the State of North Carolina has induced Dell and other [*28] business corporations to locate their economic activities in North Carolina, rather than in another state within the United States by conditioning favorable tax treatment on the

corporations' decisions to place new machinery and equipment in North Carolina, create jobs in North Carolina and purchase real property in North Carolina and not elsewhere within the United States.

69. By providing a credit against the corporate income or franchise tax measured exclusively by business activities occurring in-state but not for identical activities that occur out-of-state, Section 2 confers preferential tax treatment on in-state businesses, thereby discriminating in favor of in-state business activity and against out-of-state activity, in violation of the restrictions imposed on discriminatory state taxation by the Commerce Clause of Art. I, § 8 of the U.S. Constitution.

Count 3 - U.S. Constitution

(Sales and Use Tax Refund Violates Commerce Clause)

70. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 69.

71. Section 3 of the Dell legislation amending [*N.C. Gen. Stat. § 105-164\(j\)\(2\)*](#) and (3) provides a refund [*29] of local and State sales and use taxes paid on building materials, supplies, fixtures, and equipment purchased in North Carolina, which are used on a project in North Carolina, but not for identical building materials, supplies, fixtures, and equipment purchased out-of-state, and which are used on a project that is located in North Carolina. Thus Section 3 discriminates in favor of in-state business activity and investment and against similar out-of-state activity and investment, and consequently hinders free trade among the states, in violation of the restrictions imposed on discriminatory state and local taxation by the Commerce Clause of Article 1, § 8 of the U.S. Constitution.

72. The Plaintiffs, all as state taxpayers and Jerry Johnson and Wilford R. Dowe as state and local taxpayers in Winston-Salem and Forsyth County are directly injured by this scheme in that the sales tax refund unlawfully depletes the funds of the State and Forsyth and Winston-Salem governments to which the Plaintiffs Jerry Johnson and Wilford R. Dowe contribute through their tax payments, thereby diminishing the funds available for lawful purposes and imposing disproportionate burdens on the Plaintiff [*30] taxpayers.

ADDITIONAL CONSTITUTIONAL CLAIMS ARISING OUT OF THE DELL LEGISLATION

Count 4 - U.S. Constitution

(Major Computer Manufacturing Credit Violates Equal Protection Clause of the U.S. Constitution)

73. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 72.

74. The new major computer manufacturing credit provided by the Dell legislation is based in part on the maximum increased employment level ever attained by the taxpayer (including the qualified hires of related entities and strategic partners), as opposed to the Bill Lee Act which requires a credit to expire if jobs receiving state tax credits are reduced. Thus, Dell and another company having identical output and the same increased employment levels in a given year, may be eligible for substantially different tax credits based on Dell's increased employment level attained in an earlier year, thus providing Dell with more favorable tax treatment. Allowing a credit to Dell for jobs that are lost during a given year, while at the same time denying those same tax credits to another taxpayer that loses jobs is not rationally related to the [*31] legislature's stated purpose of creating and "maintaining" sustainable jobs.

75. Allowing Dell to meet their threshold criteria for investment and employment by including the investment dollars and jobs created by "strategic partners and related entities" when no other taxpayer is allowed to similarly include another entity's investment dollars and jobs is not rationally related to North Carolina's current tax structure as a separate entity filing state and may not permit proper auditing by the North Carolina Department of Revenue.

76. The method and means of determining the amount of allowable tax credits provided in the Dell legislation as codified at [N.C. Gen. Stat. §§ 105-129.60-66](#) is arbitrary and irrational, and deprives Plaintiffs, as non-beneficiaries under the statute, of their right to equal protection of the laws as guaranteed to them by the Equal Protection Clause of the United States Constitution.

Count 5 - U.S. Constitution

(Bill Lee Act Enhancements Violate Equal Protection

Clause of the U.S. Constitution)

77. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 76.

78. Under the enhancements [*32] of Section 2 of the Dell legislation, Dell will receive all of the benefits of locating in a tier one county or development zone, despite its location in a tier five county. Passing special legislation to allow a specific class of taxpayer in a tier five county to receive the benefits normally reserved for taxpayers locating in a tier one county and allowing the taxpayer to meet those base criteria requirements by utilizing outside sources such as "strategic partners and related entities" is not rationally related to the purpose and goals of the Bill Lee Act.

79. By its effect, Section 2 of the Dell legislation is arbitrary and irrational, and deprives Plaintiffs, as non-beneficiaries under the statute, of their right to equal protection of the laws as guaranteed to them by the Equal Protection Clause of the United States Constitution.

Count 6 - 42 U.S.C. § 1983

80. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 79.

81. One, some or all Defendants, or their predecessors in office, acting in their official capacities as officials of the City, County, and State, acted under color of [*33] the laws of the State of North Carolina, and individually and/or in concert with one another deprived plaintiffs of their rights, privileges and immunities as citizens of the United States of the rights afforded them by the Commerce Clause and the Equal Protection Clause of the United States Constitution, in violation of [42 U.S.C. § 1983](#).

Count 7 - N.C. Constitution

(Major Computer Manufacturing Credit Violates the Equal Protection Clause and the Law of the Land Clause of the N.C. Constitution)

82. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 81.

83. The new major computer manufacturing credit provided by the Dell legislation is based in part on the maximum increased employment level ever attained by the taxpayer (including the qualified hires of related entities and strategic partners), as opposed to the Bill Lee Act which requires a credit to expire if jobs receiving state tax credits are reduced. Thus, Dell and another company having identical output and the same increased employment levels in a given year, may be eligible for substantially different tax credits based [*34] on Dell's increased employment level attained in an earlier year. Allowing a credit to Dell for jobs that are lost during a given year, while at the same time denying those same tax credits to another taxpayer that loses jobs is not rationally related to the legislature's stated purpose of creating and "maintaining" sustainable jobs.

84. Allowing Dell to meet their threshold criteria for investment and employment by including the investment dollars and jobs created by "strategic partners and related entities" is not rationally related to North Carolina's current tax structure as a separate entity filing state and may not permit proper auditing by the North Carolina Department of Revenue.

85. The method and means of determining the amount of allowable tax credits provided in the Dell legislation as codified at [N.C. Gen. Stat. §§ 105-129.60-66](#) is arbitrary and irrational, and deprives Plaintiffs, as non-beneficiaries under the statute, of their right to equal protection of the laws and due process as guaranteed to them by [Article I, § 19 of the North Carolina Constitution](#).

Count 8 - N.C. Constitution

(Bill Lee Act Enhancements Violate the Equal Protection Clause and [*35] the Law of the Land Clause of the N.C. Constitution)

86. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 85.

87. Under the enhancements of Section 2 of the Dell legislation, Dell will receive all of the benefits of locating in a tier one county or development zone, despite its location in a tier five county. Passing special legislation to allow a specific class of taxpayer in a tier five county to receive the benefits normally reserved for taxpayers locating in a tier one county and allowing the taxpayer to

meet those base criteria requirements by utilizing outside sources such as "strategic partners and related entities" is not rationally related to the purpose and goals of the Bill Lee Act.

88. By its effect, Section 2 of the Dell legislation is arbitrary and irrational, and deprives Plaintiffs, as non-beneficiaries under the statute, of their right to equal protection of the laws and due process as guaranteed to them by [Article I, § 19 of the North Carolina Constitution](#).

Count 9 - N.C. Constitution

(Major Computer Manufacturing Credit Permits Unlawful Delegation of Authority and Violates Separation [*36] of Powers Clause)

89. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 88.

90. 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 V, Section 2(3) and violated the separation of powers clause under [Article I, Section 6 of the North Carolina Constitution](#).

Count 10 - N.C. Constitution

(Dell Legislation Violates Exclusive Emoluments Provision)

91. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 90.

92. The Dell legislation violates [Article I, 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 accrue to Dell's private financial benefit and to the shareholders of Dell and are thus exclusive and separate emoluments not in exchange for any public [*37] service. Dell is provided a special tax benefit merely for operating its own private business.

Count 11 - N.C. Constitution

(Dell Legislation Violates the Public Purpose Clause)

93. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 92.

94. The Dell legislation violates [Article V, Section 2\(1\) of the North Carolina Constitution](#) in that the benefits, tax credits, grants and/or subsidies provided to Dell pursuant to this legislation provide direct government subsidies for a private business enterprise, namely Dell and Dell's shareholders and are not for a "public purpose only."

Count 12 - N.C. Constitution

(Dell Legislation Violates the Uniformity of Taxation Clause)

95. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 94.

96. The Dell Legislation violates [Article V, Section 2\(2\) of the North Carolina Constitution](#) in that the refund or credit of taxes to Dell violates the requirement of uniformity of taxation within classifications and was not enacted by general law nor is it uniformly applicable to all businesses in every [*38] county, city and town and other unit 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.

Count 13 - N.C. Constitution

(Any Contract Signed Pursuant to the Dell Legislation is Unconstitutional as Not for a "Public Purpose Only")

97. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 96.

98. The Dell Legislation violates [Article V, Section 7 of the North Carolina Constitution](#) in that the legislated benefits, tax credits, grants and/or subsidies accruing to Dell pursuant to this legislation, upon information and belief, will be part of a contract or contracts between various agents of the State and Dell. Any such contract granting benefits, tax credits, grants and/or subsidies and any resulting land, buildings, equipment, roads, etc. will accrue to the ownership and control of Dell and will be utilized to generate a profit for Dell and Dell's shareholders and thus, would not be for the accomplishment of a "public

purpose only."

Count 14 - N.C. Constitution

(Dell Legislation Unconstitutionally [*39] Surrenders, Suspends and Contracts Away the Power of Taxation)

99. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 98.

100. The Dell Legislation violates [Article V, Section 2\(1\) of the North Carolina Constitution](#) in that the tax credits and sales tax refunds given to Dell constitute the surrendering, suspending and/or contracting away of the taxing power of the State for at least 15 years by providing Dell with tax credits valued at least \$ 240,000,000 with a 25 year carry-forward. This action also denies the State taxpayers, as well as City and County taxpayers the benefits of Dell's tax liability and increases the burden on Plaintiffs and other State and local taxpayers.

Count 15 - N.C. Constitution

(Major Computer Manufacturing Credit Unconstitutional as Impermissibly Vague and Ambiguous)

101. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 100.

102. In passing the Major Computer Manufacturing Credit, the N.C. General Assembly delegated to the Secretary of Commerce the responsibility for determining the taxpayer's eligibility [*40] for receiving the tax credit. This delegation pursuant to N.C. Gen. Stat. § § 105-129.62-63 is unconstitutional as impermissibly vague and ambiguous in that it is incapable of reasonably certain interpretation, and the statute does not prescribe objective standards, nor a forfeiture of tax credits already taken when the taxpayer fails to perform as promised. Thus, this delegation allows the Secretary to apply the statute in an arbitrary manner and unlawfully exercise the legislature's taxing authority.

N.C. CONSTITUTIONAL CLAIMS ARISING OUT OF THE RESOLUTIONS ADOPTED BY THE CITY OF WINSTON-SALEM AND FORSYTH

COUNTY, NORTH CAROLINA**Count 16 - N.C. Constitution****(City and County Resolutions Violate the Equal Protection and Law of the Land Clauses)**

103. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 102.

104. The Resolutions attached hereto as Exhibits D and E violate [*Article I, Section 19 of the N.C. Constitution*](#) in that the benefits, tax refunds, grants and/or other subsidies received by Dell pursuant to these Resolutions accrue to Dell's benefit and to Dell's shareholders without substantially [*41] similar or equal benefits accruing to the plaintiffs or other individuals and businesses creating new jobs or expanding businesses in the Winston-Salem, Forsyth County area.

105. Providing such benefits to help offset the project costs including land acquisition, site preparation, infrastructure, other project costs, and tax rebates for one favored enterprise burdens plaintiffs Jerry Johnson and Wilford Dowe, and other City and County taxpayers by unlawfully diminishing the tax revenue available to the City and County for necessary and lawful governmental purposes and potentially increasing the current property tax liability for plaintiffs Johnson and Dowe, and other City and County taxpayers. Thus, the Resolutions are not rationally related to the stated purpose and goals of stimulating the local economy, promoting business, creating new full-time jobs in the County, and increasing the property tax base and revenues.

106. By their effect, the Resolutions are arbitrary and irrational, and deprive Plaintiffs, as non-beneficiaries under the Resolutions, of their right to equal protection of the laws and due process as guaranteed to them by Equal Protection Clause and the Law of the [*42] Land Clause of [*Article I, § 19 of the North Carolina Constitution*](#).

Count 17 - N.C. Constitution**(City and County Resolutions Violate the Exclusive Emoluments Clause)**

107. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 106.

108. The Resolutions attached as Exhibit D and E violate [*Article I, Section 32 of the North Carolina Constitution*](#) in that the benefits, tax refunds, credits, grants and/or subsidies received by Dell pursuant to these Resolutions accrue to Dell's private financial benefit and to Dell's shareholders and are thus exclusive and separate emoluments not in exchange for any public service in that, the land, improvements thereon, roadwork, and other structural work and benefits, including property tax rebates will accrue to the ownership and control of Dell and will be utilized to generate a profit for Dell and its shareholders. Dell is provided a special tax benefit merely for operating its own private business.

Count 18 - N.C. Constitution**(City and County Resolutions Violate the Public Purpose Clause)**

109. Plaintiffs incorporate by reference and reallege fully herein [*43] the contents of the foregoing paragraphs 1 through 108.

110. The Resolutions attached as Exhibit D and E violate Article V, Section 2(1) in that the benefits, tax refunds, grants and/or subsidies received by Dell pursuant to these Resolutions and the resulting land, improvements thereon, roadwork, and other structural improvements accrue to Dell's private financial benefit and to Dell's shareholders and are not for a "public purpose only."

Count 19 - N.C. Constitution**(The Resolutions Unconstitutionally Surrender, Suspend and Contract Away the Power of Taxation)**

111. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 110.

112. The Resolutions attached as Exhibits D and E and, upon information and belief, any resulting contractual agreements violate [*Article V, Section 2\(1\) of the North Carolina Constitution*](#) in that the tax rebates given to Dell pursuant thereto, constitute the surrendering, suspending and contracting away of the taxing authorities of the City of Winston-Salem and Forsyth County's power to retain lawfully collected real property taxes on the value of Dell's developed property for at least [*44] 15 years. This action also denies the City and County taxpayers of the benefits of Dell's tax liability and increases the burden on Plaintiffs

Jerry Johnson and Wilford Dowe, and other City and County taxpayers.

Count 20 - N.C. Constitution

(Any Contract Signed Pursuant to the Resolutions is Unconstitutional as Not for a "Public Purpose Only")

113. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 112.

114. The Resolutions attached as Exhibits D and E violate [*Article V, Section 7 of the North Carolina Constitution*](#) in that the benefits, improvements on the site, roadwork, and other structural work and benefits, including property tax rebates will accrue to the ownership and control of Dell and will be utilized to generate a profit for Dell and their shareholders and upon information and belief will be part of a contract or contracts between Dell and various Defendants. Any such contract granting benefits, improvements on the site, roadwork, and other structural work and benefits, including property tax rebates will accrue to the ownership and control of Dell and will be utilized to generate a profit for [*45] Dell and its shareholders and thus, would not be for the accomplishment of a "public purpose only."

Count 21 - N.C. General Statutes

(The Specific Acts Authorized by the Resolutions and Dell Legislation Violate [*N.C. Gen. Stat. § 158-7.1*](#))

115. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 114.

116. The aforementioned specific tax credits, direct grants, and other subsidies authorized and/or granted to Dell by the City, the County, the State of North Carolina, and the agents thereof are not authorized by the General Statutes of North Carolina, specifically [*N.C. Gen. Stat. § 158-7.1*](#).

Count 22 - N.C. Declaratory Judgment Act

117. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 116.

118. The Dell legislation adopted by the North Carolina General Assembly and signed into law by Governor

Easley providing various tax credits and direct grant subsidies to Dell is unauthorized, unlawful, unconstitutional and arbitrary.

119. The Resolutions adopted by the City, and County to provide tax and/or direct grant subsidies to Dell are [*46] unauthorized, unlawful, unconstitutional and arbitrary.

120. There is a genuine, subsisting, and justiciable controversy between and among the parties to the action arising out of conflicting interpretations of and contentions as to the constitutionality of the actions by the State, City, and County.

121. The Defendants are proceeding with providing various promises and benefits outlined in the Dell legislation and/or Resolutions in that, upon information and belief, the site has been cleared and construction has begun and is underway on the proposed manufacturing facility for Dell in Forsyth County, North Carolina.

122. Pursuant to [*N.C. Gen. Stat. § 1-253*](#), Plaintiffs are entitled to a declaration, that the legislation, resolutions, or terms and conditions of any contracts entered into pursuant to such legislation or resolutions by, the State, City and County, and any agents thereof, including but not limited to the Secretary, WSBI, the Alliance, and the Millennium Fund are unconstitutional and thus, unlawful.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray:

A. That the Court issue an order declaring that the Dell legislation, passed by the N.C. General [*47] Assembly, and any resulting contractual agreement is unauthorized, unlawful, arbitrary and in violation of the State and Federal Constitutions as alleged in this complaint;

B. That the Court issue an order declaring that any Resolutions, passed by the City Council of the City of Winston-Salem and the County Commissioners of Forsyth County, and any resulting contractual agreement is unauthorized, unlawful, arbitrary and in violation of the State Constitution, facially or as applied, as alleged in this complaint;

C. That to the extent any public money or benefits have already been paid or transferred to Dell, or any other agent thereof, by the State, City, County or any agents

thereof, pursuant to the legislation, resolutions, or other resulting contracts or agreements, then Dell or the receiving entity be ordered to refund, return, or reimburse to the public treasury of the State, the City and/or the County such money paid and/or the value of any benefits received;

D. That the Court order such other relief including relief by way of injunction as the Court deems proper;

E. That the Court designate this case as an "exceptional or complex" matter pursuant to Rule 2.1 [*48] of the General Rules of Practice;

F. That the Court award the plaintiffs their reasonable attorney's fees as allowed by law;

G. That the Court tax the costs of this action against the defendants; and

H. That the Court award such further and additional relief as the Court may deem necessary and proper.

This 23rd day of June, 2005.

North Carolina Institute for Constitutional Law

/s/ Robert F. Orr

Robert F. Orr (State Bar No. 6798)

Pamela B. Cashwell (State Bar No. 19542)

225 Hillsborough Street, Suite 280

Raleigh, North Carolina 27619

Phone: (919) 838-5313

Facsimile: (919) 838-5316

Attorneys for the Plaintiffs

End of Document