

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 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. 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.

**MOTION BY DEFENDANTS
CITY OF WINSTON-SALEM,
ALLEN JOINES, FORSYTH COUNTY,
GLORIA D. WHISENHUNT,
THE MILLENNIUM FUND, WINSTON-
SALEM BUSINESS, INC.,
AND THE WINSTON-SALEM
ALLIANCE FOR CHANGE OF VENUE
AS A MATTER OF RIGHT, TO DISMISS
AMENDED COMPLAINT FOR FAILURE
TO STATE A CLAIM, AND TO DISMISS
AMENDED COMPLAINT FOR LACK OF
STANDING**

[CHVN] [DISM]

NOW COME the Defendants, 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.; and The Winston-Salem Alliance,¹ and respectfully move the Court (1) pursuant to G.S. § 1-83 and Rule 12(b)(3) of the North

¹ For ease of reference, the State of North Carolina and James T. Fain III are referred to as the "State Defendants"; Defendants City of Winston-Salem, Allen Joines, Forsyth County, and Gloria D. Whisenhunt are collectively referred to herein as the "Local Government Defendants"; the Millennium Fund, Winston-Salem Business, Inc., and the Winston-Salem Alliance are collectively referred to herein as the "Local Non-Profit Defendants"; and Defendant Dell, Inc. is referred to as "Dell".

Carolina Rules of Civil Procedure, as a matter of right, for an order transferring the causes of action alleged against the Local Government Defendants and the Local Non-Profit Defendants to the Superior Court of Forsyth County, North Carolina for all further proceedings; (2) pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, for an order dismissing the Amended Complaint or specific claims therein for failure to state a claim upon which relief can be granted as against the Local Government Defendants and the Local Non-Profit Defendants; and (3) pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, for an order dismissing the Amended Complaint or specific claims therein for lack of standing for Plaintiffs to assert such a claim or claims against the Local Government Defendants and the Local Non-Profit Defendants. In support of these motions, these moving Defendants respectfully show the Court:

MOTION FOR CHANGE OF VENUE

1. The Local Government Defendants are local governmental entities located in Forsyth County or officials of local governmental entities located in Forsyth County. The Non-Profit Defendants are non-profit business development corporations located in Forsyth County whose dedicated purpose is to promote business development in Winston-Salem and Forsyth County, and they are apparently sued on the basis of their participation with the Local Government Defendants in economic development efforts in Forsyth County which are the subject of this action.

2. It appears on the face of the Amended Complaint that the only two plaintiffs who have any colorable standing to assert claims against any or all of these moving Defendants are Jerry R. Johnson, a resident of Forsyth County, North Carolina, and Wilford R. Dowe, a resident of Winston-Salem, Forsyth County, North Carolina.

3. Even though combined in one “Complaint,” it appears on the face of the Amended Complaint that the first 15 counts apply only to the State of North Carolina Defendants and Dell, while counts 16 through 21 apply only against the Local Government Defendants, the Local Non-Profit Defendants and Dell.² It further appears on the face of the complaint that the first 15 counts of the Complaint (against the State Defendants and Dell) challenge the legality of legislation enacted by the North Carolina General Assembly; while counts 16 through 21 (against the Local Government Defendants, the Local Non-Profits and Dell) challenge the legality of resolutions enacted by the Winston-Salem City Council and the Forsyth County Commission and actions taken pursuant thereto within Forsyth County. Count 22, which purports to state a claim for a declaratory judgment against all defendants, while stated as one count, is, on its face, separate claims seeking a declaratory judgment against the State Defendants and Dell regarding the constitutionality of state incentives under state legislation; and a separate declaratory judgment against the Local Government Defendants and Local Non-Profit Defendants regarding the constitutionality of local incentives under local government resolutions and a contract (containing a local forum clause) between Dell and the Local Government Defendants and Non-Profit Defendants based on those local resolutions.

4. By virtue of the provisions of G.S. § 1-77(2), and the case law applying that statute, the Local Government Defendants and the Non-Profit Defendants are entitled as a matter of right to a bifurcation of the Amended Complaint and a transfer of the causes of action applicable to them to the Superior Court of Forsyth County, North Carolina.

² It is not clear that count 6 of the Complaint, which purports to assert a claim pursuant to 42 U.S.C. § 1983, is intended to be directed against these Defendants, but if so there is no factual or legal basis for a § 1983 claim against these Defendants under the facts and claims alleged in the Complaint.

MOTION OF THE LOCAL GOVERNMENT DEFENDANTS AND THE NON-PROFIT DEFENDANTS TO DISMISS FOR FAILURE TO STATE A CLAIM

1. The allegations stated in the Amended Complaint fail to state a claim upon which relief can be granted against these Defendants, and they are entitled to dismissal of the Amended Complaint in its entirety or particular claims therein as a matter of law pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. This defense is asserted collectively and individually on behalf of each moving Defendant as to each count of the Amended Complaint.

ALTERNATIVE MOTION OF THE LOCAL GOVERNMENT DEFENDANTS AND THE NON-PROFIT DEFENDANTS TO DISMISS FOR LACK OF STANDING

1. The Amended Complaint does not contain allegations sufficient to establish the Plaintiffs' standing to assert the claims alleged in the Amended Complaint against these Defendants. Thus, this Court lacks jurisdiction with respect to the Amended Complaint in its entirety or as to particular claims or Plaintiffs, and to that extent the Amended Complaint should be dismissed pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

WHEREFORE, the Local Government Defendants and the Non-Profit Defendants respectfully pray the Court:

1. That the Complaint be bifurcated and all claims against the Local Government Defendants and the Non-Profit Defendants be transferred to the Superior Court of Forsyth County, North Carolina for all further proceedings;

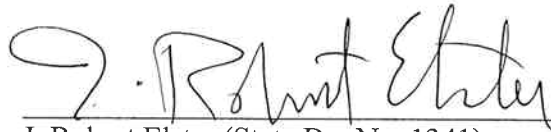
2. That after proper venue is established, the Court grant the Local Government Defendants' and the Non-Profit Defendants' motion to dismiss for failure to state a claim upon which relief can be granted as to some or all of the Defendants;

3. That after proper venue is established, the Court grant the Local Government Defendants' and the Non-Profit Defendants' motion to dismiss for lack of standing on the part of some or all of the plaintiffs;

4. That the attorneys' fees and costs incurred in filing these motions be taxed against the Plaintiffs; and

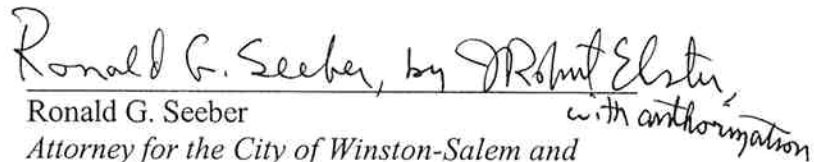
5. For such other and further relief as the Court deems just and proper.

This the 7th day of October, 2005.



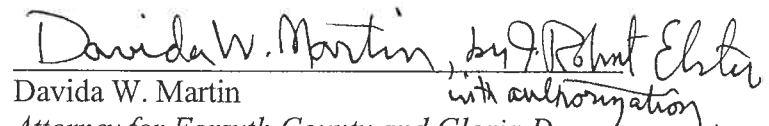
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MOTION FOR CHANGE OF VENUE AS A MATTER OF RIGHT, TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM, AND TO DISMISS AMENDED COMPLAINT FOR LACK OF STANDING** was this day served upon the below-named party by mailing, postage prepaid, first class mail, a copy of such document to counsel at the address shown below:

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This the 7th day of October, 2005.



J. Robert Elster

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