

DEFENDANT DELL, INC.'S  
MOTION TO DISMISS  
THE PLAINTIFFS' AMENDED  
COMPLAINT AND PETITION  
FOR DECLARATORY  
JUDGMENT  
[N.C. R. Civ. P. 12(b)(1) & 12(b)(6)]

FILED

2011 OCT 12 PM 1:52

COURT REPORTER

)	DELMA BLINSON, JERRY R. JOHNSON,
)	KELLIENE FISHER, DONALD R. REID,
)	BRIAN GOSSAGE, WILFORD R. DOWE,
)	and KENT MISSEGADES,
)	Plaintiff
)	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
)	MILLENIUM FUND; WINSTON-SALEM
)	BUSINESS, INC.; THE WINSTON-SALEM
)	ALLIANCE; and DELL, Inc.,
)	Defendants

COMES NOW the Defendant, DELL, INC. ("Dell"), by and through its undersigned counsel, and moves to dismiss the Plaintiff's Amended Complaint and Petition for Declaratory Judgment and all claims therein pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

In support of this motion, Dell states as follows:

1. These Plaintiffs have not presented allegations that would, if true, establish their standing to advance any claim presented in the Amended Complaint and Petition, and because

Count 1 challenges N.C. Gen. Stat. §105-129.60-66 providing a credit against a taxpayer's corporate income or corporate franchise taxes for the construction of qualifying major computer manufacturing facilities. The Plaintiffs allege that these statutes violate the dormant Commerce Clause of the United States Constitution. Count 1 fails to state valid claims under the Commerce Clause of the United States Constitution. The alleged tax credits challenged in Count 1 do not discriminate against or burden interstate commerce, as that concept has been delineated by the Supreme Court of the United States. Indeed, Count 1 challenges statutes that clearly on their face directly further the purposes underlying the commerce clause: encouraging interstate commerce and placing out-of-state businesses on at least an equal footing with in-state companies. Count 1 should be dismissed.

**(Major Computer Manufacturing Credit)**

**Count 1 – United States Constitution**

**COMMERCE CLAUSE CLAIMS**

12(b)(1) for lack of jurisdiction.

2. Even if the Plaintiffs have standing, their Amended Complaint and Petition nonetheless should be dismissed with prejudice under Rule 12(b)(6) because they fail to allege any valid claim upon which relief can be granted under either federal or state law. Specifically, the Defendant Dell contends that each count of the Plaintiffs Amended Complaint and Petition for Declaratory Judgment previously filed with this Court must be dismissed for the reasons hereinafter set forth in this Motion to Dismiss.

Count 3 of the Amended Complaint and Petition should be dismissed because it fails to state a valid claim under the dormant Commerce Clause of the United States Constitution. The alleged tax refund for sales and use taxes challenged in Count 3 does not discriminate against interstate commerce, and, contrary to the allegations in Count 3, the subject law (N.C. Gen. Stat. §105-64(j)) on its face clearly does not limit any refund to taxes paid on items "purchased in North Carolina." Count 3 should be dismissed.

(Sales and Use Tax)

Count 3 – United States Constitution

In Count 2 of the Plaintiffs' Amended Complaint and Petition they contend that N.C. Gen. Stat. §105-129.4(7) is an inducement to major computer manufacturing and distribution taxpayers to locate their activities in North Carolina rather than in another state by conditioning favorable tax treatment on such corporations' decisions to place new machinery and equipment in North Carolina and purchase real property in North Carolina and not elsewhere. The Plaintiffs contend that this statute thereby discriminates in favor of in-state business activity and against out-of-state business activity in violation of the Commerce Clause of the United States Constitution. The alleged tax credits challenged in Count 2 do not discriminate, much less impermissibly discriminate, against interstate commerce, as that concept has been delineated by the Supreme Court of the United States. Instead, the statute speaks clearly and directly furthers the purposes underlying the Commerce Clause: encouraging interstate commerce and placing out-of-state businesses on at least an equal footing with in-state companies. Count 2 should be dismissed.

protection claims.

Therefore, Count 5 should be dismissed because the Plaintiffs have failed to allege valid equal purpose of encouraging economic development by offering incentives to such development. rational and nondiscriminatory means for achieving the State's legitimate interest in the public Equal Protection Clause of the United States Constitution. The challenged legislation is a them as non-beneficiaries under the statute of equal protection of the laws guaranteed by the allege that the amendment adding the new sub-section is arbitrary and irrational and deprives of locating in a tier 1 county or development zone despite its location in a tier 5 county. They N.C. Gen. Stat. §105-129.4 the legislature provided that Defendant Dell will receive the benefits In Count 5 the Plaintiffs allege that by the addition of new sub-section "(b. 7)" of

**(Bill Lee Act Amendment - - Equal Protection Clause of the United States Constitution)**

**Count 5 - United States Constitution**

incentives. They do not violate the Equal Protection Clause, and Count 4 should be dismissed. legitimate interest in the public purpose of encouraging economic development through challenged statutes provide rational and nondiscriminatory means for achieving the State's the laws as guaranteed by the Equal Protection Clause of the United States Constitution. The deprives the Plaintiffs as non-beneficiaries under the statute of their right to equal protection of facilities and activities, codified as N.C. Gen. Stat. §105-129.60-66, is arbitrary and irrational and method of determining the amount of allowable tax credit for major computer manufacturing Count 4 of the Plaintiffs' Amended Complaint and Petition alleges that the

**(Equal Protection Clause of the United States Constitution)**

**Count 4 - United States Constitution**

Count 8 of the Amended Complaint and Petition alleges that by adding new subsection "(b7)" to N.C. Gen. Stat. §105-129.4 the legislature provided that Dell would receive the benefits of locating in a Tier 1 county or development zone, despite its location in a Tier 5

**(Bill Lee Act Amendments – Equal Protection  
Law of the Land Clause of the North Carolina Constitution)**

**Count 8 – North Carolina Constitution**

Count 7 should be dismissed.

Count 7 of the Amended Complaint and Petition alleges that the means of determining the amount of any allowable credit against the corporate income or corporate franchise taxes of a major computer manufacturing and distribution taxpayer codified in N.C. Gen. Stat. §§105-129.60-61 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 by Article I, §19 of the North Carolina Constitution." The challenged legislation provides rational and nondiscriminatory means for achieving the State's legitimate interest in the public purpose of creating jobs and fostering economic development in the State and, therefore, the Plaintiffs have failed to allege valid claims that they have been denied any right guaranteed by Article I, §19.

**(Major Computer Manufacturing Facilities Credit –  
Equal Protection and Law of the Land Clauses of the North Carolina Constitution)**

**Count 7 – North Carolina Constitution**

Count 6 should be dismissed.

Count 6 of the Amended Complaint and Petition, alleging a claim under 42 U.S.C. § 1983, should be dismissed because (as stated above) Plaintiffs fail to state valid claims under either the Commerce Clause or the Equal Protection Clause of the United States Constitution.

**Count 6 – 42 U.S.C. § 1983**

County. The Plaintiffs contend that this is special legislation allowing one class of taxpayers to obtain this status while others cannot and is not rationally related to the purpose and goals of the Bill Lee Act. They contend that the amendment is arbitrary and irrational and deprives them as non-beneficiaries under the statute of their right to equal protection of the laws and due process guaranteed them by Article I, §19 of the North Carolina Constitution. It is apparent from the face of the legislation that it provides a rational means for achieving the State's legitimate interest in the public purpose of encouraging economic development by granting incentives. The legislation does not violate Article I, §19 of the North Carolina Constitution and Count 8 should be dismissed.

**Count 9 – North Carolina Constitution**

**(Major Computer Manufacturing Credit – Unlawful Delegation of Authority and Separation of Powers)**

Count 9 of the Amended Complaint and Petition alleges that by allowing the Secretary of Commerce to determine whether a taxpayer is entitled to major computer manufacturing credits and failing to require a forfeiture of funds for failure to produce anticipated jobs or make anticipated investments, the legislature has unlawfully delegated its taxing authority to the Executive Branch in violation of Article V, Section 2(3) of the North Carolina Constitution and has violated the Separation of Powers Clause of Article I, Section 6 of the North Carolina Constitution. Count 9 should be dismissed because the Plaintiffs fail to state a valid claim under Article V, § 2(3) or Article I, §6 of the North Carolina Constitution. There is no separation or delegation of powers violation because the Secretary of Commerce is exercising executive power under the challenged statute. Further, even assuming arguendo that there has been a delegation of

In Count 11 the Plaintiffs allege that the "benefits, tax credits, grants, and/or subsidies provided to Dell" by statute (Article 3G of Chapter 105 of the General Statutes) are "direct government subsidies for a private business enterprise" and are not for a public purpose. Therefore, the Plaintiffs allege that the legislation violates Article V, §2(1) of the North Carolina Constitution requiring that the power of taxation be exercised "for public purposes only." The legislation providing tax credits for major computer manufacturing facilities and enhancing tax incentives for those facilities promotes economic development, job creation, and an enhanced tax base. Under *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996) the legislation serves a public purpose and does not violate the Public Purpose Clause of the North Carolina Constitution. Count 11 should be dismissed.

**(The Public Purpose Clause)**

**Count 11 – North Carolina Constitution**

Count 10 of the Amended Complaint and Petition should be dismissed because the Plaintiffs fail to state a valid claim under Article I, § 32 of the North Carolina Constitution, the Exclusive Emoluments Clause. All benefits that the State is providing to Dell under applicable legislation serve well established public purposes and promote the general welfare rather than benefit the individual taxpayer, and there is a rational basis for the legislature to conclude that granting such benefits serves the public interest. Count 10 should be dismissed.

**(Dell Legislation)**

**Count 10 – North Carolina Constitution**

legislative power, the subject legislation contains adequate standards to govern and guide the exercise of the powers delegated to the Secretary of Commerce. Count 9 should be dismissed.