

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In the Matter of the Application of  
LEE BORDELEAU, et al.,

Plaintiffs,

-against-

DECISION  
AND  
ORDER

The STATE OF NEW YORK, The NEW YORK STATE  
ASSEMBLY, The NEW YORK STATE SENATE, DAVID  
PATTERSON, Individually and as Governor of the State of  
New York, et al.,

Defendant s.

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(Supreme Court, Albany)  
Index No. 6582-08  
RJI No. 01-08-

(Justice Michael C. Lynch, Presiding)

APPEARANCES:

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LYNCH, J.:

By Order to Show Cause (Egan, J.) dated August 4, 2008, plaintiffs commenced this declaratory judgment action seeking to enjoin defendants from distributing or receiving state funds appropriated in the New York State budget in purported violation of the New York State Constitution. The State defendants have moved to dismiss the complaint, as have several of the individually named defendants. Oral argument was held on the motions on December 3, 2008.

To begin, State legislative enactments enjoy a strong presumption of constitutionality and plaintiffs bear the heavy burden of proving unconstitutionality

beyond a reasonable doubt (Schultz v. State of New York, 84 NY2d 231, 241). On a motion to dismiss, this Court

“must afford the pleadings a liberal construction,...accept the facts as alleged in the [complaint] as true, accord [plaintiffs] the benefit of every possible favorable inference, and determine only whether the facts as alleged in the [pleadings] fit within any cognizable legal theory” (Matter of Maron v. Silver, \_\_\_ AD2d \_\_\_ [3<sup>rd</sup> Dcpt. 11-13-08], quoting Leon v. Martinez, 84 NY2d 83, 87-88 (internal quotations omitted)).

In their complaint, plaintiffs essentially maintain that the appropriation and use of State funds to promote economic development through private entities violates Article VII §8 of the New York State Constitution. The State duly acknowledges that “Article VII §8 prohibits the gift or loan of state money or credit to any private corporation; or private undertaking” (see State, Memo of Law, Point I at p. 11; see Wein v. State of New York, 39 NY2d 136, 142-144). The challenged appropriations, however, pertain to the funding of economic development programs through the Urban Development Corporation, which functions as the Empire State Development Corporation (ESDC), a public benefit corporation (see New York Unconsolidated Laws §6254[1] [McKinney’s]); as well as the Department of Agriculture and Markets. The essence of the State’s motion to dismiss is that these appropriations foster the public purpose of economic development and do not violate Article 7 §8. This Court agrees with the State.

The State is authorized to provide funding to a public benefit corporation, including ESDC (see Schultz v. State of New York, 84 NY2d 231, 246; Wein v.

State of New York, supra, at 145-146; Comerseki v. City of Elmira, 308 NY 248, 252). The very purpose of the ESDC is to promote the State's policy of enhancing job opportunities, urban renewal and economic development (New York Unconsolidated Laws §6251 et seq. [McKinney's]). As delineated in the supporting affidavit of Douglas Wehrle, Senior Vice President of the ESDC Loans and Grants Department, recipients of ESDC funds are required to fulfill their commitments under the agreement and to meet the job retention/creation and economic development goals prescribed by the ESDC. For example, the ESDC accepted a \$65,000,000.00 Capital Grant Incentive Proposal from the International Business Machines Corporation ("IBM") to expand nanotechnology research, development and manufacturing activities within the State. For its part, IBM will invest \$1.5 billion dollars in New York State from 2008 through 2011 to expand this program (see Affidavit of Douglas Wehrle, at paragraphs 40 and 41). Subsequent to oral argument, counsel for IBM has informed the Court that IBM and the ESDC have signed a grant agreement and on December 15, 2008, ESDC disbursed \$44,349,388.21 to IBM (see 1/26/09 letter from Attorney Sankoorikal).

A review of the ESDC projects at issue here shows that each speaks to a viable public, economic development purpose (see New York Unconsolidated Laws §6252 [McKinney's]). The contrary and speculative affidavit of plaintiffs' expert, William Anderson, does not compel a contrary finding, or raise a genuine issue of

fact on the question of public purpose. Accordingly, the court finds no violation of Article VII §8 in the appropriation of funds to the ESDC for these grants.

This holds true for the appropriations channeled through the Department of Agriculture and Markets (“Department”) for the promotion of the wine and apple industries in New York State. The Department’s very purpose is to promote the agricultural industry in New York State for the overall benefit of the public (Agriculture & Markets Law §3). The Department is expressly authorized to aid in the promotion and marketing of New York’s wine and grape products (Agriculture & Markets Law §16 [2-b]). The appropriations at issue here, that provide the funding for contracts between the Department and the New York State Apple Growers Association, the New York Wine & Grape Foundation, and the Long Island Wine Council all fulfill the public purpose stated and are not prohibited under Article VII §8.

Plaintiff also challenges the budget appropriations as lacking the specificity required by Article VII §7 of the New York State Constitution. Article VII §7 provides that “no money shall ever be paid...except in pursuance of an appropriation by law...and every such law...shall distinctly specify the sum appropriated, and the object or purpose to which it is to be applied...” Plaintiff complains here that certain challenged appropriations provide for the funds to be spent according to a memorandum of understanding (“MOU”) between the

Governor, the Speaker of the Assembly and the Majority Leader of the Senate — characterized by plaintiffs as “Three Men in a Room” (see Plaintiff’s Memorandum of Law at p. 8). Plaintiff further characterizes this structure as an improper delegation of legislative authority in violation of Article III of the State Constitution.

In Saxton v. Carey, (44 NY2d 545, the Court of Appeals explained that while the Constitution unquestionably requires itemization in the State budget, the degree of itemization is for the Executive and Legislative branches of government to determine, not the Courts (Id. at 550-551). In approving a provision for the intra-program transfer of funds after budget approval, the Court acknowledged that the Legislature may approve a budget that allows for governmental flexibility (Id at 551). That same analysis applies here to sustain the challenged MOU format.

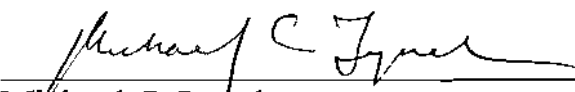
Insofar as the State maintains the action should be dismissed for failing to name all necessary parties, including the recipients of several ESDC grants at issue, plaintiffs confirm in reply that they “do not seek the return of funds given to any non-party” (Plaintiff’s Reply Memorandum of Law, Point V, p. 8) (compare Schultz v. State of New York, 160 Misc 2d 741, 750-751).

Accordingly, the State’s motion to dismiss the complaint as failing to state a viable claim is granted, without costs; the corresponding motions of the other named defendants are also granted dismissing the complaint, all without costs.

This Memorandum constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the Attorney General's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

SO ORDERED!  
ENTER

Dated: Albany, New York  
February 27, 2009

  
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Michael C. Lynch  
Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause (Egan, J.) dated August 4, 2008, with Summons and Verified Complaint;
2. Affirmation of James Ostrowski, dated August 6, 2008;
3. Plaintiff's Memorandum of Law dated September 15, 2008;
4. Plaintiff's Reply Memorandum of Law dated October 6, 2008;
5. 10/24/08 Letter from Attorney Ostrowski addressed to the Court and Affidavit of William Anderson dated November 5, 2008;
6. State's Notice of Motion to Dismiss dated September 29, 2008;
7. Affirmation of Diane Smith, dated September 28, 2008 with Exhibits "A" - "E";
8. Affirmation of Kathy Bennett (undated) with attachments;

9. Affidavit of Douglas Wehrle, dated September 29, 2008 with attached budget excerpts;
10. State's Memorandum of Law dated September 29, 2008;
11. Letter from Attorney Sankoorikal addressed to the Court;
12. October 9, 2008 and November 19, 2008 Letters from Assistant Attorney General Siegfried addressed to the Court;
13. Notice of Motion to Dismiss of Defendant IBM, returnable October 13, 2008, with affidavit of Allan Hoefft dated September 26, 2008; Affidavit of Patrick O'Leary dated September 24, 2008; Affirmation of Kathleen McDermott dated September 29, 2008; IBM's Memorandum of Law dated September 29, 2008; and IBM's Reply Memorandum of Law dated October 9, 2008, with October 9, 2008 letter from Attorney Sankoorikal addressed to the Court; and Defendant IBM's November 17, 2008 Response to Plaintiff's submission of Affidavit of William Anderson;
14. Notice of Motion to Dismiss of Defendant Advanced Micro Devices returnable October 13, 2008, with Affirmation of Michael Koenig dated September 29, 2008, Affirmation of Victoria Lane dated September 30, 2008, and Memorandum of Law dated September 29, 2009; October 10, 2008 letter of Attorney Koenig addressed to the Court; and Further Memorandum of Law dated November 19, 2009;
15. Notice of Motion to Dismiss of Defendant American Axel & Manufacturing, Inc., returnable October 13, 2008 with Affirmation of Robert Scott, dated September 26, 2008; October 10, 2008 Letter of Attorney Scott addressed to the Court; and Affirmation of Timothy Graber dated November 18, 2008; and
16. Notice of Motion to Dismiss of Defendant West Genesee Hotel Associates returnable October 13, 2008, with Affirmation of Kevin Cross dated September 29, 2008 and November 19, 2008.