

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

ROBERT L. SCHULZ (New York), et al.,

Plaintiffs,

v.

STATE OF NEW YORK, Neil Kelleher,
Douglas Kellner, Evelyn Aquila and Helena
Moses Donahue, State Board of Elections, et al.,

Defendants.

Case No. 07-CV-0943 LEK/DRH

MEMORANDUM IN SUPPORT OF
OREGON DEFENDANTS' MOTION TO
DISMISS

TABLE OF CONTENTS

INTRODUCTION1

BACKGROUND1

ARGUMENT.....2

 I. This court lacks personal jurisdiction over the Oregon defendants.....2

 A. Plaintiffs have not alleged facts sufficient to confer personal
 jurisdiction over the Oregon defendants under New York Law.....3

 1. The Oregon defendants are not “doing business” in New
 York.....4

 2. The Oregon defendants are not within the scope of New
 York’s long-arm statute4

 B. Extending jurisdiction over the Oregon defendants is also
 impermissible under the Due Process Clause of the United States
 Constitution6

 II. Defendant State of Oregon is immune from suit under the Eleventh
 Amendment7

CONCLUSION7

INTRODUCTION

Plaintiffs' amended complaint challenges the constitutionality of the election procedures in several different states, including Oregon. Nowhere in the amended complaint, however, do plaintiffs allege any facts that could justify the exercise of personal jurisdiction over the Oregon defendants in this matter. Plaintiffs do not allege that the Oregon defendants committed any act within the state of New York, or that the Oregon defendants have violated the rights of any New York resident. Indeed, plaintiffs fail to allege that the Oregon defendants had *any* contacts with New York. Plaintiffs have thus failed to allege facts sufficient to confer jurisdiction over the Oregon defendants under either New York law or the Due Process Clause. In addition, plaintiffs' claims with respect to defendant State of Oregon are barred by the Eleventh Amendment to the United States Constitution. Because this court lacks jurisdiction over the Oregon defendants, plaintiffs' amended complaint should be dismissed.

BACKGROUND

Plaintiffs' amended complaint names more than 100 defendants: fifty states¹ together with each state's respective chief election officials. There are two named Oregon defendants, the State of Oregon and Oregon's Secretary of State, Bill Bradbury.

The amended complaint alleges that the voting processes employed by all of the defendants violate the United States Constitution because those processes are not sufficiently "open, verifiable or transparent." Amended Complaint, ¶ 217. In particular, plaintiffs allege that the defendants' use of "machines and/or computers" for vote casting and counting in elections is unconstitutional. *Id.* at ¶ 218. Plaintiffs also allege that defendants violate the Constitution by failing to count ballots by hand, failing to keep ballots "in public view or in the public custody before the votes are counted and publicly posted at each and every voting station," and failing to

¹ It is not entirely clear whether plaintiffs intend to name *both* the state and the state's election officials, or simply the election officials acting in his or her official capacity. In describing the parties, however, the amended complaint appears to name the states and their respective officials as separate parties.

publicly announce the number of votes cast for candidates at each voting station. *Id.* at ¶¶ 219-20.

Plaintiffs' amended complaint ostensibly identifies three claims for relief. In the first claim, plaintiffs allege that the voting procedures used by defendants infringe on plaintiffs' right to vote as articulated by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428; 112 S. Ct. 2059; 119 L. Ed. 2d 245 (1992). In their second claim for relief, plaintiffs allege that the voting procedures are a violation of plaintiffs' "contract rights," based on the assertion that "[f]ormally registering with the State to vote * * * is a contract." Amended Complaint, ¶ 252. In what purports to be a "third cause of action," plaintiffs submit a set of voting procedures that, they allege, defendants are constitutionally required to follow during the 2008 primary and general elections, including the exclusive use of hand-counted paper ballots. Among other relief, plaintiffs ask the court to permanently enjoin defendants from conducting any elections in 2008 that are not "machine-free." *Id.* at ¶ 268.

The amended complaint does not allege any contacts, related to elections or otherwise, between the Oregon defendants and the State of New York. The amended complaint does not allege any acts by the Oregon defendants that occurred within the state of New York. The amended complaint does not allege any acts by the Oregon defendants that violated the rights of any New York resident in any way.

ARGUMENT

I. This court lacks personal jurisdiction over the Oregon defendants.

A plaintiff bears the burden of establishing that the court has personal jurisdiction over each of the defendants. *Florczak v. Staffieri*, 2006 U.S. Dist. LEXIS 22935 (D.N.Y. 2006). At the pleading stage, a plaintiff is required to make at least a prima facie showing that such jurisdiction exists. *Id.* In this case, plaintiffs have failed to meet that burden with respect to the Oregon defendants.

A district court sitting in a diversity action may exercise personal jurisdiction to the same extent as the courts of general jurisdiction of the state in which it sits. Fed. R. Civ. P. 4(k)(1)(A). Because New York's long-arm statute does not extend as far as federal due process permits, *Wing Shing Products v. Simaltex Manufactory Co.*, 479 F. Supp. 2d 388 (S.D.N.Y. 2007), the analysis of whether this court has personal jurisdiction over a particular defendant proceeds in two steps. First, the court must determine if New York law would confer upon its courts the jurisdiction to reach the defendant. Second, if there is a basis for jurisdiction under New York law, the court must then determine whether New York's extension of jurisdiction in such a case would be permissible under the Due Process Clause of the Fourteenth Amendment. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir. 2002).

Plaintiffs have failed to allege facts that, if true, would be sufficient to confer jurisdiction over the Oregon defendants under either New York law or the Due Process Clause. Nor could they; the Oregon defendants have not engaged in the required minimum contacts with New York that would permit the court to exercise personal jurisdiction over them in this matter.

A. Plaintiffs have not alleged facts sufficient to confer personal jurisdiction over the Oregon defendants under New York Law.

Under New York law, there are two ways in which a court may exercise personal jurisdiction over a non-domiciliary defendant. First, if the defendant "does business" in New York, the court may exercise its general jurisdiction pursuant to N.Y. CPLR § 301. Second, even if the defendant does not "do business" in New York, specific jurisdiction may be exercised if the defendant falls under New York's long-arm statute, N.Y. CPLR § 302. *King v. Best Western Country Inn*, 138 F.R.D. 39, 41 (S.D.N.Y. 1991); *Maggi v. Women's College Hospital et al.*, 2007 U.S. Dist. LEXIS 19253 (N.D.N.Y. 2007). In this case, plaintiffs have not alleged facts sufficient to establish personal jurisdiction over the Oregon defendants under either test.

1. The Oregon defendants are not “doing business” in New York.

Under New York law, a court has “general jurisdiction” over defendants who are “engaged in such a continuous and systematic course of “doing business” here as to warrant a finding of its ‘presence’ in this jurisdiction.” *See Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 191 (S.D.N.Y. 2000) (internal quotation marks omitted) (citing N.Y. C.P.L.R. § 301). For purposes of establishing jurisdiction, a defendant who is “doing business” in New York engages in a “continuous and systematic course of conduct in New York.” *Mareno v Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990).

In this case, there are no allegations that the Oregon defendants engaged in *any* course of conduct in New York, much less a course of conduct that was “continuous and systematic.” In fact, the Oregon defendants have not engaged such contacts. The court therefore lacks general jurisdiction over the Oregon defendants under New York law.

2. The Oregon defendants are not within the scope of New York’s long-arm statute.

New York’s long-arm statute is N.Y. C.P.L.R. § 302(a). It provides:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

Plaintiffs have failed to any allege facts to support the exercise of jurisdiction over the Oregon defendants under any of the four prongs of N.Y. C.P.L.R. § 302(a).

First, plaintiffs have failed to provide any factual allegations to support jurisdiction over the Oregon defendants under section 302(a)(1). To determine the existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant “transacts any business” in New York and, if so, (2) whether this cause of action “aris[es] from” such a business transaction. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007). A suit “arises from” a party’s activities in New York if there is “an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York.” *Id.* In this case, plaintiffs do not allege that the Oregon defendants have done anything at all within New York. Nor do they identify any connection between any actions that took place in New York and the Oregon defendants. With respect to the Oregon defendants, plaintiffs challenge only the manner in which votes are counted in Oregon. Plaintiffs do not identify any way in which this is connected to New York.

Second, plaintiffs have failed to provide any factual allegations to support jurisdiction over the Oregon defendants under section 302(a)(2) or (3). Plaintiffs do not allege that any of the defendants committed a tort of any kind. *See Bank Brussels Lambert*, 305 F.3d at 125 (to satisfy section 302(a)(2) or (3), plaintiff must “aver facts constituting a tort under the law of the pertinent jurisdiction.” (internal quotation marks omitted)). They claim only that the defendants’ use of electronic vote counting machines is an infringement of their voting and contract rights. Further, plaintiffs do not allege that the Oregon defendants committed *any* conduct, much less tortious conduct, within New York. Nor do they allege any way in which that any conduct of the Oregon defendants caused injury to a person or property within New York.

Finally, plaintiffs do not allege facts sufficient to support jurisdiction over the Oregon defendants under section 302(a)(4). Nowhere in the amended complaint do plaintiffs allege that

any of the defendants, including the Oregon defendants, “own[], use[] or possess[] any real property” within the State of New York.

In sum, even assuming that all the facts alleged in the amended complaint were true, New York’s long-arm statute, CPLR § 302, does not confer upon its courts the jurisdiction to reach the Oregon defendants in this matter. Because New York law does not confer to its courts personal jurisdiction to reach the Oregon defendants, this court lacks personal jurisdiction over the Oregon defendants. Plaintiffs’ amended complaint should be dismissed on that ground.

B. Extending jurisdiction over the Oregon defendants is also impermissible under the Due Process Clause of the United States Constitution.

Because there is no basis for jurisdiction under New York law, it is not necessary for the court to determine whether the exercise of jurisdiction over the Oregon defendants would comport with federal due process. But even if New York law did purport to extend personal jurisdiction over the Oregon defendants in this case, to do so would violate the Due Process Clause.

The Due Process Clause limits the exercise of personal jurisdiction to persons having certain “minimum contacts” with the forum state. *Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, 2007 U.S. Dist. LEXIS 72873 (N.D.N.Y. 2007). *See Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Essential to the exercise of personal jurisdiction in each case is “some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Burger King Corp.*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)). To establish personal jurisdiction, plaintiffs must demonstrate either specific jurisdiction, if the suit arises from the defendant’s contacts with the forum, or general jurisdiction—that is, jurisdiction irrespective of whether the claim arises from or relates to the defendant’s forum contacts—based on the defendant’s

“continuous and systematic” contacts with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

In this case, as has already been noted, plaintiffs have failed to allege that the Oregon defendants had *any* contacts with New York, much less “minimum” ones sufficient to justify the exercise of personal jurisdiction. Under the Due Process Clause, therefore, plaintiffs have failed to allege facts sufficient to confer personal jurisdiction over the Oregon defendants.

II. Defendant State of Oregon is immune from suit under the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution generally bars claims in federal court against the states and their agencies. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), “a plaintiff may sue a state official acting in his official capacity—notwithstanding the Eleventh Amendment—for prospective, injunctive relief from violations of federal law.” *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) (internal quotation marks omitted). Importantly, however, the ruling in *Ex Parte Young* does *not* allow injunctive action against a state, as opposed to state officers. *Ashe v. Board of Elections*, 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. 1988).

In this case, plaintiffs have named the State of Oregon as a defendant. Because the State of Oregon is immune from suit under the Eleventh Amendment, the claims against the State of Oregon should be dismissed.

CONCLUSION

Plaintiffs do not allege facts sufficient to support a finding of personal jurisdiction over the Oregon defendants in this matter, nor is there any basis for this Court to conclude it has such

jurisdiction. In addition, the claims against defendant State of Oregon are barred by the Eleventh Amendment. For these reasons, the Oregon defendants' motion to dismiss should be granted.

DATED this 8th day of November, 2007.

Respectfully submitted,

HARDY MYERS
Attorney General



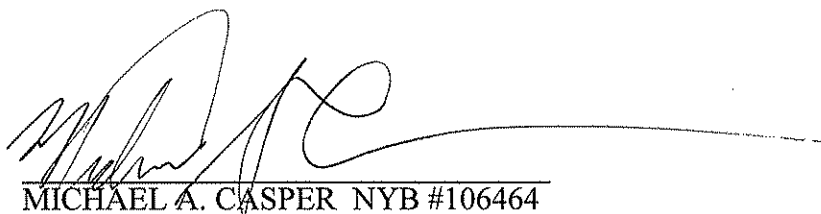
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CERTIFICATE OF SERVICE

I certify that on November 8th, 2007, I served the foregoing MEMORANDUM IN SUPPORT OF OREGON DEFENDANTS' MOTION TO DISMISS upon the parties hereto by the method indicated below, and addressed to the following:

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