

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

ROBERT SCHULZ (New York), et al,	)	C/A No. 1:07-CV-0943 LEK/DRH
	)	
Plaintiffs,	)	
	)	STATE OF SOUTH CAROLINA’S
v.	)	MEMORANDUM IN SUPPORT
	)	OF MOTION TO DISMISS
STATE OF NEW YORK, et al,	)	
	)	
Defendants.	)	
_____	)	

The Defendant State of South Carolina (State)<sup>1</sup> submits this memorandum in support of its Motion to Dismiss in this case.

**BACKGROUND**

Plaintiffs' original complaint named twenty Defendants: ten states together with each state's respective Secretary of State. The two named South Carolina Defendants were the State of South Carolina and its Secretary of State, Mark Hammond. Subsequently, Plaintiffs filed their Amended Complaint that dropped the Secretary as a Defendant and added numerous other parties.

The Amended Complaint alleges that the voting processes employed by the Defendants violate the United States Constitution because those processes are not sufficiently "open, verifiable or transparent." In particular, Plaintiffs allege that the Defendants' use of "machines and/or

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<sup>1</sup> The Defendant Mark Hammon(sic)[correct spelling is Hammond], Secretary of State, (Secretary) was named in the original complaint but dropped as a Defendant in the Amended Complaint. Therefore, he is no longer a party to this case; however, *arguendo*, in an abundance of precaution and to the extent necessary, this Motion to Dismiss includes the Secretary as to both the original and amended complaints. Reasons 1, 2, 4 and 5, listed in the Motion, apply to the Secretary including, but not limited to, lack of personal jurisdiction of the Secretary. An additional ground is that the Secretary has no responsibility under South Carolina law for the matters alleged

computers" for vote casting and counting in elections is unconstitutional. Plaintiffs also allege that Defendants violate the Constitution by failing to count ballots by hand, failing to keep ballots "in public view at each voting station before the votes are counted," and failing to publicly announce the number of votes cast for candidates at each voting station.

Plaintiffs' Amended Complaint ostensibly identifies three claims for relief. Plaintiffs' first cause of action alleges that the voting procedures used by Defendants infringe on their 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). Their second cause of action alleges 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." 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."

The Amended Complaint does not allege any contacts, related to elections or otherwise, between the State and the State of New York. The Amended Complaint does not allege any acts by the State of South Carolina that occurred within the State of New York. The Amended Complaint does not allege any acts by the State that violated the rights of any New York resident in any way.

## ARGUMENT

### I.

#### THIS COURT LACKS PERSONAL JURISDICTION OVER THE STATE

A Plaintiff bears the burden of establishing that the court has personal jurisdiction over each of the defendants. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779 (2d Cir., 1999). 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 as to the State.

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. FRCP/4(k)(1)(A). 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, supra*; *Wing Shing Products v. Simaltex Manufactory Co.*, 479 F. Supp. 2d 388 (S.D.N.Y. 2007). Because New York's long-arm statute does not extend as far as federal due process permits, “the Court may limit its inquiry to whether [Plaintiffs] can establish that personal jurisdiction is proper under the New York long-arm statute.” *Wing Shing Products v. Simaltex Manufactory Co.*, 479 F. Supp. 2d 388 (S.D.N.Y. 2007).

The State of South Carolina is not within the scope of New York's long-arm statute, N.Y. C.P.L.R. § 302(a), which provides as follows:

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 State under any of the four prongs of N.Y. C.P.L.R. § 302(a).<sup>2</sup>

First, Plaintiffs have failed to provide any factual allegations to support jurisdiction over the State 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

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<sup>2</sup> If a defendant "does business" in New York, the court may exercise its general jurisdiction pursuant to N.Y. CPLR § 301. *See Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 191 (S.D.N.Y. 2000). In order to establish jurisdiction, such a defendant must be engaged in a "continuous and systematic course of conduct in New York." *Mareno v Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990). The instant Amended Complaint has absolutely no allegations that the State is conducting any business whatsoever in New York.

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 State has done anything at all within New York. Nor do they identify any connection between any actions that took place in New York and the State of South Carolina. With respect to the State, Plaintiffs challenge only the manner in which votes are counted in South Carolina. Plaintiffs do not identify any way in which such acts are connected to New York.

Second, Plaintiffs have failed to provide any factual allegations to support jurisdiction over the State 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 State of South Carolina committed any conduct, much less tortious conduct, within New York. Nor do they allege any way in which that any conduct of the State caused injury to a person or property within New York.

Finally, Plaintiffs do not allege facts sufficient to support jurisdiction over the State under section 302(a)(4). Nowhere in the Amended Complaint do Plaintiffs allege that the State of South Carolina, "owns, uses or possess real property" within the State of New York.

In sum, the Amended Complaint does not allege any basis for New York's long-arm statute, CPLR §302, to confer jurisdiction upon its courts to reach the State of South Carolina in this matter. Because New York law does not confer to its courts personal jurisdiction to reach the State, this court lacks personal jurisdiction over the State of South Carolina. Plaintiffs' Amended Complaint

should be dismissed on that ground.

Because there is no basis for jurisdiction under New York law, whether the exercise of jurisdiction over the State would comport with federal due process need not be determined; however, the Due Process Clause would clearly bar jurisdiction in this case.

The Due Process Clause limits the exercise of personal jurisdiction to persons having certain "minimum contacts" with the forum state. *See, Burger King Corp. v. Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316(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)). Plaintiffs have failed to allege that the State of South Carolina has 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 State.

## II.

### **DEFENDANT STATE OF SOUTH CAROLINA 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). In this case, the State of South Carolina is immune from suit under the Eleventh Amendment. Therefore, this action against that State should be dismissed.

### III.

#### NEW YORK IS NOT THE PROPER VENUE FOR THE STATE

The venue statute 28 U.S.C. §1391 sets standards for venue depending upon whether jurisdiction is founded only on diversity of citizenship. Of course, no basis exists for jurisdiction in this case and Plaintiffs have not alleged a basis for venue nor do they cite the diversity statute; however, regardless of whether, *arguendo*, jurisdiction were established only on the basis of diversity or on some other basis, no provision of §1391 gives this Court a basis for venue as to the State.

Section 1391 provides as follows:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The State of South Carolina does not “reside” in New York which rules out paragraphs (a)(1) and (b)(1). A substantial part of the events or omissions did not occur in New York because of the apparent naming of all of the fifty states ruling out (a)(2) and (b)(2) as grounds for venue. The State is not subject to personal jurisdiction in New York nor can it be found in New York thereby barring

venue as to them under (a)(3) and (b)(3). *See*, Commentary on Subdivision (b), Clause (3) and 1995 revision of subdivision (a), clause (3), by David D. Siegel at 28 U.S.C.A. §1391.

### CONCLUSION

For the foregoing reasons, the State of South Carolina respectfully requests that this action against the State be dismissed.

Respectfully submitted,

/s/ J. Emory Smith, Jr.  
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November 9, 2007



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

ROBERT SCHULZ (New York), et al,	)	C/A No. 1:07-CV-0943 LEK/DRH
	)	
Plaintiffs,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
STATE OF NEW YORK, et al,	)	
	)	
Defendants.	)	
_____	)	

I hereby certify that I have served the State of South Carolina’s Memorandum in Support of Motion to Dismiss upon Plaintiffs in accordance with this Court’s Order of October 30, 2007, by mailing a copy of each document to the Lead Plaintiff’s Representative at the address below via the United States Mail this November 9, 2007:

Mr. Robert L. Schulz  
2458 Ridge Road  
Queensbury, NY 12804

Service on other Defendants is by electronic means.

/s/ J. Emory Smith, Jr.  
NY Bar Roll No. 106463  
J. EMORY SMITH, JR.  
Assistant Deputy Attorney General