

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

ROBERT L. SCHULZ, DOUG BERSAW, :
AMANDA MOORE, ARTHUR GROVEMAN, :
JAMES CONDIT, JR., FRED SMART, PAM :
WAGNER, TROY D. REHA, GREGORY :
GOREY, SUSAN MARIE WEBER, and :
MARY D. FARRELL, :
Plaintiffs, :

-against- :

STATE OF NEW YORK, Lorraine Cortes- :
Vazquez, Secretary of State, :
STATE OF NEW HAMPSHIRE, William :
Gardner, Secretary of State, :
STATE OF SOUTH CAROLINA, Mark :

Hammon, Secretary of State, :
STATE OF FLORIDA, Kurt S. Browning, :
Secretary of State, :
STATE OF OHIO, Jennifer Brunner, :
Secretary of State, :
STATE OF ILLINOIS, Jesse White, :
Secretary of State, :
STATE of IOWA, Michael Mauro, :
Secretary of State, :
STATE OF TEXAS, Phil Wilson, :
Secretary of State, :
STATE OF CALIFORNIA, Debra Bowen, :
Secretary of State, :
STATE OF OREGON, Bill Bradbury, :
Secretary of State, :
Defendants. :

TEXAS DEFENDANTS' MOTION
TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT
PURSUANT TO FED.R.
CIV.P. 12(b)(2) WITH ORDER

NO. 1:07-CV-094 LEK/DRH

TO THE HONORABLE LAWRENCE E. KAHN:

Defendants the State of Texas and Phil Wilson, Secretary of State for the State of Texas

(“Texas Defendants”) file this Motion to Dismiss Plaintiffs’ First Amended Verified Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(2), and in support, would respectfully show the Court the following:

**I.
INTRODUCTION**

Plaintiffs brought suit against the 50 states and their respective election officials generally challenging the constitutionality of Defendants’ voting processes to be used during the primary and general elections in 2008. In sum, Plaintiffs allege that the Defendant’ voting procedures impose an impermissible burden, violate a right encompassed with the Equal Protection Clause of the 14th amendment, and the voting procedures heavily burden the right to vote and may deprive a party insurgent of the right to have his voice heard and his views considered. “A constitutionally compliant voting procedure is available.” *Complaint at* ¶ 81.

However, at no point in the amended complaint do the plaintiffs allege any facts that would justify the exercise of personal jurisdiction over the Texas Defendants. Plaintiffs fail to allege that the Texas Defendants have any contacts with the State of New York, much less the contacts necessary to establish personal jurisdiction under the New York Long Arm Statute or the Due Process Clause. As the arguments and authorities below will show, this Court does not have personal jurisdiction over the Texas Defendants, and the Plaintiffs’ claims against them should be dismissed.

**II.
ARGUMENT AND AUTHORITIES**

A. Personal Jurisdiction.

1. New York’s Long Arm Statute Does Not Reach Plaintiffs’ Claims Against the Texas Defendants.

In considering the issue of personal jurisdiction over a non-domiciliary, a court must first apply the forum state's long arm statute and then determine, if the requirements of the long arm statute are met, whether the exercise of jurisdiction over the defendant would comport with the requirements of due process. *See, Fort Knox Music Inc. v Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000). Therefore, despite the fact that Plaintiffs do not even cite the New York long arm statute as a basis for jurisdiction, an analysis of the application of that statute follows.

A foreign entity may be subjected to suit in New York under C.P.L.R. 301 only if the entity has "engaged in such a continuous and systematic course of doing business ... as to warrant a finding of its presence in the jurisdiction." *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (internal quotations and citations omitted). Sporadic business activity in New York will not meet this standard; rather, "the court must be able to say from the facts that the [entity] is present in the state not occasionally or casually, but with a fair measure of permanence and continuity." *Landoil Resources Corp. v. Alexander & Alexander Serv. Inc.*, 77 N.Y.2d 28, 34 (1990).

Plaintiffs have alleged no facts which show that the Texas Defendants have engaged in even sporadic business activity in the state of New York, much less such a continuous and systematic course of business so as to result in a measure of permanence and continuity. Accordingly, Plaintiffs' suit against the Texas Defendants does not meet the requirements of C.P.L.R. § 301.

C.P.L.R. § 302 provides for jurisdiction over acts of non-domiciliaries. It provides in relevant part:

- (a) As to a cause of action arising from any acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary...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...; or
3. commits a tortious act without the state causing injury to person or property within the state...

N.Y.C.P.L.R. § 302(a) (McKinney 2006). “Under CPLR § 302, a single transaction of business is sufficient to confer jurisdiction, even if the defendant never entered New York, so long as the defendant’s activities in New York were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *New York Access Billing, LLC v. ATX Communs., Inc.*, 289 F. Supp 2d 260, 264 (N.D.N.Y. 2003) (citations and internal quotations omitted).

Plaintiffs alleged no facts that show the Texas Defendants doing *any* business in New York. Even assuming the Texas Defendants had conducted some business in New York, Plaintiffs have made no showing that there is a substantial relationship between the hypothetical business activity and the claim asserted. Plaintiffs complain generally of the use of electronic voting machines in several states, including Texas. Any action taken by the Texas Defendants in relation to the use of electronic voting machines in Texas necessarily occurred *in Texas* and not in New York.

Finally, without admitting that the Plaintiffs have actually alleged any tortious conduct by the Texas Defendants, even if they have, they have made no showing that those actions caused injury to any person or property within the state. Therefore, Plaintiffs’ suit against the Texas Defendants does not meet the requirements of C.P.L.R. § 302(a).

Because the Plaintiffs’ claims against the Texas Defendants do not meet the requirements of the New York long arm statute, they are not subject to personal jurisdiction in the Northern District of New York, and the Plaintiffs’ claims against them should be dismissed.

2. Exercising Personal Jurisdiction over the Texas Defendants via New York’s Long Arm Statute Would not Comport with Due Process.

Even if this court determines that New York’s long arm statute reaches Plaintiffs’ claims

against the Texas Defendants, exercising personal jurisdiction over them pursuant to that statute would not comport with the requirements of due process.¹

“A court’s jurisdiction over a defendant satisfies the demands of due process when there are ‘minimum contacts’ between the defendant and the forum ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Id.*, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). “The defendant’s conduct and connection with the forum State must be such that he should reasonably anticipate being hauled into court there.” *Id.*, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A court may exercise either general or specific jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9 (1984). General jurisdiction applies where a defendant’s activities in the state are “substantial” or “continuous and systematic,” even if the cause of action is unrelated to those activities. *Data Disc, Inc. v Systems Tech. Assoc.*, 557 F.2d 1280, 1287 (9th Cir. 1997). Likewise, “[a] plaintiff’s unilateral activity in relation to a defendant cannot alone sustain personal jurisdiction under the ‘minimum contacts’ theory.” *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 325 (D.C. 2000) citing *Hanson v. Denckla*, 357 U.S. 235 (1958). “Rather, ‘it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State.’” *Id.* Finally, “it is well established that New York’s long arm requirement of doing business is more restrictive than the requirements of minimum contacts.” *New York Access Billing, LLC v. ATX Communs., Inc.*, 289 F. Supp 2d at 265 (citations omitted).

¹*See, New York Access Billing, LLC v. ATX Communs., Inc.*, 289 F. Supp 2d at 265 (“After determining that the Northern District of New York may exercise personal jurisdiction over [the defendant] via New York’s long arm statute, further analysis of whether such an exercise of long arm jurisdiction comports with due process is required.”).

Plaintiffs here have failed to plead *any* facts which would establish that the Texas Defendants have substantial or continuous and systematic contacts with the State of New York. In fact, they have failed to allege that the Texas Defendants have had *any* contacts with New York. Accordingly, Plaintiffs have failed to plead facts sufficient to establish this Court's having general jurisdiction over the Texas Defendants.

In *Helicopteros*, the U.S. Supreme Court "elucidated the distinction between general and specific jurisdiction cases: (1) 'When a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising specific jurisdiction over the defendant,' and (2) 'When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to defendant's contacts with the forum, the State has been said to be exercising general jurisdiction.'" *Id. citing Helicopteros, supra.*

As stated above, Plaintiffs have failed to plead any facts that would support this Court's having general jurisdiction over the Texas Defendants. Where general jurisdiction is inappropriate, a court may still exercise specific jurisdiction if the suit arises out of the defendant's contacts with the forum. At no point in this case do Plaintiffs complain of *any* actions taken by the Texas Defendants in the State of New York. In fact, as alluded to above, the conduct Plaintiffs complain of could only have taken place in Texas. Accordingly, Plaintiffs have failed to plead any facts to establish that this Court has specific personal jurisdiction over the Texas Defendants.

Because Plaintiffs have failed to plead sufficient facts to establish that the Texas Defendants have had sufficient minimum contacts with the State of New York to establish this Court's having jurisdiction over them, and because Plaintiffs have failed to allege any cause of action arising out of the Texas Defendants' contacts with the forum (of which there are none), this Court lacks personal

jurisdiction over the Texas Defendants, and Plaintiffs' claims against them should be dismissed.

**III.
CONCLUSION AND PRAYER**

ACCORDINGLY, Plaintiffs' claims against Defendants the State of Texas and Phil Wilson, Secretary of State for the State of Texas, should be dismissed with prejudice, pursuant to Fed. R. Civ. P. 12(b)(2), because the Court lacks personal jurisdiction. The Texas Defendants respectfully pray that this Honorable Court grant their Motion to Dismiss and request such further relief as they are entitled to.

Respectfully Submitted,

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Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Litigation

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/s/ Thomas J. Turner
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AND PHIL WILSON, SECRETARY OF STATE FOR THE
STATE OF TEXAS

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Defendant. :

AFFIRMATION OF SERVICE

I, Thomas J. Turner, affirm, under penalties of perjury pursuant to 28 U.S.C. § 1746, that the following is true and accurate to the best of my knowledge:

1. I am not a party to this action and I am over 18 years of age.
2. On November 20, 2007, I served one copy of the accompanying Motion to Dismiss Plaintiff's

First Amended Verified Complaint, Under Fed.R.Civ.P. 12(b)(2) with Order on the party and person below. These documents have been delivered to the Mail Center of the Office of the Attorney General for the State of Texas from which they will be sent via certified mail, return receipt requested *and* First Class U.S. Mail.

TO:

Robert L. Schultz
2458 Ridge Road
Queensbury, NY 12804

3. A true and correct copy of the foregoing pleading has been filed by electronic notification on November 20 , 2007.

Dated: Austin, Texas
November 20, 2007

/s/ Thomas Turner
THOMAS J. TURNER
Assistant Attorney General