

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

ROBERT SCHULZ (New York), et al.,	)	<b>C/A No. 1:07-CV-0943 LEK/DRH</b>
Plaintiffs,	)	
v.	)	<b>STATE OF NORTH DAKOTA'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS</b>
STATE OF NEW YORK, et al.,	)	
Defendants.	)	

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**STATEMENT OF THE CASE**

Plaintiffs Amended Verified Complaint (Complaint) names as Defendants the State of North Dakota; Alvin Jaeger, North Dakota Secretary of State; and various other states and state election officials. The State of North Dakota and Alvin Jaeger are collectively referred to as the State, and the arguments in this Memorandum apply to both of the State and Secretary of State Jaeger.

The Complaint alleges the voting processes employed by Defendants violate the United States Constitution because those processes are not sufficiently "open, verifiable, [or] transparent." Compl. ¶ 246. In particular, the Complaint alleges the Defendants' use of "machines and/or computers for vote casting and counting" in elections is unconstitutional. Id. ¶ 218. The Complaint also alleges 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. Id. ¶¶ 219-22.

The Complaint alleges three causes of action. The first cause of action alleges the complained of voting procedures infringe on Plaintiffs' right to vote. The second cause of action is based on contract, asserting that "[f]ormally registering with the State

to vote . . . is a contract." Id. ¶ 252.<sup>1</sup> What purports to be a third cause of action identifies voting procedures Plaintiffs allege Defendants are constitutionally required to follow during the 2008 primary and general elections. Among other relief, Plaintiffs ask the court to permanently enjoin Defendants from conducting any elections in 2008 that are not machine-free.

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

### **LAW AND ARGUMENT**

#### **I. The Court lacks personal jurisdiction over the State.**

Courts use a two-step approach when determining whether personal jurisdiction exists over a nonresident. See Grand River Enter. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 165 (2d Cir. 2005), cert. denied, 127 S. Ct. 379 (2006). The first step involves determining whether the defendant's actions satisfy the forum state's personal jurisdiction statute. Id. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process. Id. When a nonresident defendant challenges personal jurisdiction, the plaintiff has the burden of establishing personal jurisdiction exists. Id.; see also In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 399 F. Supp. 2d 325, 330-31 (S.D.N.Y. 2005).

##### **A. Personal jurisdiction does not exist under New York's long-arm statute.**

New York's long-arm statute provides:

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<sup>1</sup> It is questionable whether this cause of action applies to the State of North Dakota since North Dakota has no voter registration.

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.

N.Y. C.P.L.R. § 302(a) (McKinney 2006).

The Complaint does not allege any facts to support jurisdiction over the State under § 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.

The Complaint does not allege the State has done anything in New York. Nor does it identify any connection between any actions that took place in New York and the State of North Dakota. The Complaint challenges the manner in which votes are counted in North Dakota, acts which are in no way connected to New York.

The Complaint also fails to provide any factual allegations to support jurisdiction over the State under § 302(a)(2) or (3). There is no allegation the State committed a tort of any kind, much less a tort within New York or that caused injury to a person or property within New York. See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120 125 (2d Cir. 2002) (to satisfy § 302(a)(2) or (3), plaintiff must “aver facts constituting ‘a tort under the law of the pertinent jurisdiction’”).

Finally, the Complaint does not allege facts sufficient to support jurisdiction over the State under § 302(a)(4). The Complaint does not allege the State of North Dakota, “owns, uses or possesses any real property” within the State of New York.

There is no basis for jurisdiction under New York law. The Complaint should be dismissed against the State.

B. Personal jurisdiction does not exist under the Due Process Clause.

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.<sup>2</sup> However, as demonstrated below, the Due Process Clause would bar jurisdiction in this case.

Due process requires the defendant to have “purposefully established ‘minimum contacts’ in the forum State.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Due process also requires that “‘traditional conception[s] of fair play and substantial justice’” are not offended by the exercise of personal jurisdiction. Id. at 464 (quoting Int’l Shoe, 326 U.S. at 320). See also In re Methyl Tertiary Butyl Ether, 399 F. Supp. 2d at 331.

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<sup>2</sup> Furthermore, the Court’s inquiry can be limited to whether Plaintiffs can establish personal jurisdiction under New York’s long-arm statute because New York’s long-arm statute does not extend as far as federal due process permits. See Wing Shing Prods., Ltd. v. Simatelex Manufactory Co., 479 F. Supp. 2d 388, 397 (S.D.N.Y. 2007).

1. The Court does not have general jurisdiction.

Due process is satisfied if the defendant has “continuous and systematic” contacts with the forum. Id. This is true even if the cause of action does not relate to or arise out of those contacts. Id. This is referred to as “general jurisdiction.” Id.; see also Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567-68 (2d Cir. 1996).

The Court does not have general jurisdiction over the State. The Complaint does not allege the State had “continuous and systematic” contacts with New York. In fact, the Complaint does not allege the State had any contacts with New York.

2. The Court does not have specific jurisdiction.

Due process is also satisfied if the defendant has “specific jurisdiction” over the defendant. Id.; In re Methyl Tertiary Butyl Ether, 399 F. Supp. 2d at 331. To establish the minimum contacts necessary to establish “specific jurisdiction” over the State, Plaintiffs must show (1) their claim arises out of or relates to the State’s contacts with New York, (2) the State purposefully availed itself of the privileges of doing business in New York, and (3) the State could foresee being sued in New York. See Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 242-43 (2d Cir. 1999). If Plaintiffs satisfy those requirements, the Court must determine whether the exercise of personal jurisdiction is reasonable under the circumstances. Id.; see also Metro. Life Ins. Co., 84 F.3d at 568.

a. The State has not performed acts in New York.

The Complaint does not allege the State had any contact with New York. Because the State has not allegedly had any contacts with New York, the claim obviously does not arise out of the State’s contacts with New York.

Due process requires the defendant have fair warning that a particular activity may subject him to the jurisdiction of a particular state. Burger King, 471 U.S. at 472. The fair warning requirement is satisfied when the defendant purposefully directs his

activity at the forum, and the alleged injuries arise from that activity. Id. The defendant must perform “some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Id. at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). The minimum contacts prong of the International Shoe analysis is meant to test whether a defendant should have reasonably anticipated being sued in the forum state as a result of the contacts. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Complaint does not allege the State had any contacts whereby it could “reasonably anticipate” being hauled into court in New York.

b. Exercising jurisdiction over the State is not reasonable.

The exercise of personal jurisdiction over the State also offends traditional notions of fair play and substantial justice. The Second Circuit has identified five factors to consider in weighing the reasonableness of personal jurisdiction. Those factors include:

(1) the burden that the exercise of jurisdiction will impose on defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering social substantive policies.

Kernan, 175 F.3d at 244.

Defending this action in New York would be extremely expensive and burdensome for the State. New York also does not have a special interest in adjudicating the legality of North Dakota’s election laws. Furthermore, the only two plaintiffs that arguably have standing to challenge North Dakota’s election laws are from North Dakota, and thus do not have an interest in a New York court exercising jurisdiction. Their action could be more efficiently resolved by a state or federal court in North Dakota. Finally, it is not efficient for a New York court to address the legality of

the laws of all the states. The election laws and procedures of the various states differ. Resolution of this case would require the Court become knowledgeable of the election laws and procedures of each state, and then issue a separate decision regarding each state's laws and procedures.

The determination of personal jurisdiction stands or falls on each case's unique facts and precludes the use of "mechanical tests" and "talismanic jurisdictional formulas." Burger King Co. v. Rudzewicz, 471 U.S. 462, 478, 485 (1985). The critical element for determining minimum contacts is not the volume of activity but rather "the quality and nature of the activity in relation to the fair and orderly administration of the laws." International Shoe, 326 U.S. at 319. Neither the quantity nor quality of contacts by the State with the State of New York confers personal jurisdiction over it.

The case of Springer v. Balough, 96 F. Supp. 2d 1250 (N.D. Okla.), aff'd, 232 F.3d 902 (10<sup>th</sup> Cir. 2000), is instructive. In Springer, a candidate for office of President of the United States sued election officials in fifty states. Id. at 1254. After reviewing the requirements of personal jurisdiction, the court concluded "that Plaintiff has failed to satisfy his burden of establishing personal jurisdiction over the non-resident Defendants who have challenged the Court's exercise of personal jurisdiction. Plaintiff has not shown that Defendants purposefully directed their activities to the forum state." Id. at 1255. The Court also found "that Plaintiff has failed to show continuous and systematic contacts to support the Court's exercise of general personal jurisdiction." Id. at 1255-56. Based on those findings, the court dismissed the Complaint against the non-resident defendants. Id. at 1256.

Like the court in Springer, this Court should find Plaintiffs have not met their burden of establishing personal jurisdiction exists. Plaintiffs have not established the constitutionally required minimum contacts by the State with the State of New York.

And the exercise of personal jurisdiction over the State offends traditional notions of fair play and substantial justice. Accordingly, this Court lacks personal jurisdiction over the State and the Complaint against it should be dismissed.

## II. VENUE IS IMPROPER.

Section 1391(b), 28 U.S.C., sets forth the venue requirements when subject matter jurisdiction is not founded "solely on diversity of citizenship," as in this case.

That subsection provides:

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.

Id. Venue is improper under this statute.

"[T]he purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." Leroy v. Great W. United Corp., 443 U.S. 173, 183-84 (1979). The convenience of the plaintiff is not a factor. Id. at 185. Thus, "where 'the claim arose'" should "be ascertained by advertence to events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records." Lamont v. Haig, 590 F.2d 1124, 1134 (D.C. Cir. 1978). "Venue does not lie in a district in which 'any part of the claim, however small, arose.'" U.S. Fid. & Guar. Co. v. Alexander, 463 F. Supp. 687, 692 (S.D. Ga. 1979) (quoting Honda Assocs., Inc. v. Nozawa Trading, Inc., 374 F. Supp. 886, 892 (S.D.N.Y. 1974)).

All defendants in this case do not reside in New York. Furthermore, venue is not proper in this Court because "a substantial part of the events or omissions giving rise to the claim" did not occur in New York. In fact, there is no allegation that any of the



events giving rise to the claim against the State occurred in New York. Finally, there is another district in which the action may otherwise be brought. Venue would be proper in the United States District Court for the District of North Dakota.<sup>3</sup>

**CONCLUSION**

For the above reasons, the State of North Dakota and Alvin Jaeger respectfully request that this Court dismiss the Amended Verified Complaint.

Dated this 21<sup>st</sup> day of November, 2007.

State of North Dakota  
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<sup>3</sup> Other defenses could be raised in this motion, such as Eleventh Amendment immunity and failure to state a claim upon which relief can be granted. The State does not waive those or any other defenses by not raising them here.

**CERTIFICATE OF SERVICE**

**C/A No. 1:07-CV-0943 LEK/DRH**

I hereby certify that on November 21, 2007, the following document: State of North Dakota's Memorandum in Support of Motion to Dismiss was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) on Defendants.

I further certify that a copy of the forgoing document was served upon the following by mailing a true and correct copy thereof to the following non-ECF participant:

Robert L. Schulz  
2458 Ridge Road  
Queensbury, NY 12804

with postage prepaid, in the United States mail at Bismarck, North Dakota this 16<sup>th</sup> day of November, 2007.

/s/ Douglas A. Bahr  
Douglas A. Bahr  
Solicitor General  
ND State Bar ID No. 04940