

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

ROBERT SCHULZ (New York), et al.)

Plaintiffs,)

v.)

STATE OF NEW YORK, et al.)

Defendants.)

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

**MEMORANDUM IN SUPPORT OF WYOMING DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' AMENDED VERIFIED COMPLAINT**

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Defendants State of Wyoming and Max Maxfield, Secretary of State of the State of Wyoming (collectively “Wyoming Defendants”), by and through their counsel, the Wyoming Attorney General’s Office, have moved to dismiss the Plaintiffs’ AMENDED VERIFIED COMPLAINT on the following grounds: (1) this Court lacks personal jurisdiction over the Wyoming Defendants pursuant to FED. R. CIV. P. 12(b)(2) ; (2) this Court is not the proper venue for suit against the Wyoming Defendants pursuant to FED. R. CIV. P. 12(b)(3); and (3) pursuant to the Eleventh Amendment to the United States Constitution the State of Wyoming is immune from suit. In support of this MOTION, the Wyoming Defendants offer the following:

I. Background

In their AMENDED VERIFIED COMPLAINT, the Plaintiffs have named as Defendants each of the fifty states and their respective election officials. The named Wyoming Defendants are the State of Wyoming and Max Maxfield, the Secretary of State of Wyoming.

The AMENDED VERIFIED COMPLAINT alleges that the voting processes employed by all of the Defendants violate the United States Constitution because the use of “machines and/or computers for vote casting and counting” are not “open, verifiable or transparent[.]” AMENDED VERIFIED COMPLAINT at ¶¶ 217-218. Plaintiffs also allege that the Defendants violate the Constitution by not keeping ballots “in public view or in the public custody until

the votes are counted and publicly posted at each and every voting station” and failing to publicly announce voting results at each vote station. *Id.* at ¶¶ 219 and 221.

Plaintiffs’ AMENDED VERIFIED COMPLAINT sets forth three “causes of action.” In the first, Plaintiffs claim that the Defendants’ failure to “provide the People with a continuous public viewing – a People’s ‘Chain of Custody’ – of all ballots as contained in the ballot box or boxes during the voting period, and a manual allocation and count of all ballots in full public view promptly as the voting period ends, at each voting station, before those ballots are ever removed from public view violates the voting rights of Plaintiffs.” *Id.* at ¶ 228. In their second “cause of action,” Plaintiffs allege that the Defendants’ voting procedures violate their “contract rights” because “[f]ormally registering with the State to vote, as well as to register as a member of a political party, is a contract.” *Id.* at ¶ 252. Plaintiffs’ third “cause of action” is not a claim but a description of a voting procedure utilizing hand-marked and hand-counted paper ballots Plaintiffs contend Defendants are constitutionally mandated to follow for the 2008 primary and general elections. *Id.* at ¶ 262.

For relief, Plaintiffs request the Court to permanently enjoin Defendants from conducting any election during the 2008 primary and general elections and in any future such elections from using any voting procedure that is: (1) “not open, verifiable, transparent, machine-free, and computer-free”; (2) not conducted “exclusively on paper ballots, hand

marked and hand counted”; and (3) where paper ballots do not “remain in full public view until the results of the hand counting is publicly announced at that vote station[.]” *Id.* at ¶ 268.

II. Argument

A. This Court lacks personal jurisdiction over the Wyoming Defendants.

“When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant.” *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001) (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999)). When the motion is made at the pleading stage without a “full-blown evidentiary hearing,” the plaintiff must “make a prima facie showing that the court possesses personal jurisdiction over the defendant.” *DiStefano*, at *id.* (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)).

Pursuant to FED. R. CIV. P. 4(k)(1)(A), a federal district court may exercise personal jurisdiction over a non-resident defendant to the same extent as the courts of general jurisdiction in the state in which the district court sits. The exercise of personal jurisdiction “is proper if the defendant has sufficient contacts to satisfy both the state long arm statute and the Due Process Clause of the Fourteenth Amendment.” *Computer Assocs. Int’l, Inc. v. Altai*,

Inc., 126 F.3d 365, 370 (2d Cir. 1997) (citing *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1025-26 (2d Cir. 1997)).

New York's long-arm statute, as applicable to this matter, provides for personal jurisdiction over non-domiciliaries as follows:

(a) Acts which are the basis of jurisdiction. 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) (2007). Plaintiffs have failed to allege any facts that would support exercise of personal jurisdiction by this Court over the Wyoming Defendants under any of the circumstances enumerated above.

“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) (citing *Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs.*, 7 N.Y.3d 65, 71, 850 N.E.2d 1140, 1142, 818 N.Y.S.2d 164, 166 (2006)). The totality of the defendant’s activities within the forum state are examined to “determine whether a defendant has ‘transact[ed] business’ in such a way that it constitutes ‘purposeful activity’ satisfying the first part of the test[.]” *Best Van Lines*, 490 F.3d at 246 (quoting *Sterling Nat’l Bank & Trust Co. of N.Y. v. Fid. Mortgage Investors*, 510 F.2d 870, 873-74 (2d Cir. 1975) and *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 18-19, 209 N.E.2d 68, 75, *cert. denied* 382 U.S. 905, 86 S.Ct. 241, 15 L.Ed.2d 158 (1965)). A suit “arises from” a defendant’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.” *Best Van Lines*, 490 F.3d at 246 (quoting *Henderson v. INS*, 157 F.3d 106, 123 (2d Cir. 1998)). Plaintiffs have not alleged that the Wyoming Defendants have “transacted any business” in New York. They do not identify any connection between the electoral process adopted by the Wyoming Defendants and the state of New York.

Plaintiffs have also failed to make any allegations in support of the exercise of jurisdiction over the Wyoming Defendants pursuant to N.Y.C.P.L.R. §§ 302(a)(2) or (3). The AMENDED VERIFIED COMPLAINT does not contain any allegation that the Wyoming Defendants committed a tort in the state of New York or caused injury to a person or property within New York through an extra-territorial tortious act. See *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 125 (2d Cir. 2002) (to satisfy section 320(a)(2) or (3) the plaintiff must “aver facts constituting ‘a tort under the law of the pertinent jurisdiction.’” (internal quotation omitted)).

Finally, N.Y.C.P.L.R. § 302(a)(4) is not applicable as Plaintiffs do not allege a cause of action arising from the Wyoming Defendants’ ownership, use, or possession of any real property situated within New York.

The AMENDED VERIFIED COMPLAINT fails to allege any basis for the courts of New York to exercise personal jurisdiction under N.Y.C.P.L.R. § 302 over the Wyoming

Defendants. Since New York law does not confer personal jurisdiction over the Wyoming Defendants in its courts, this Court lacks jurisdiction over them as well. Accordingly, Plaintiffs' claims against the Wyoming Defendants should be dismissed.

Similarly, the Due Process Clause of the United States Constitution bars assertion of jurisdiction over the Wyoming Defendants in this forum. The Due Process Clause of the Fourteenth Amendment allows a court to "exercise personal jurisdiction over a non-resident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Minimum contacts may be met in two ways: (1) jurisdiction may be asserted over a non-resident defendant "if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities[;]" or (2) if a "cause of action does not arise directly from a defendant's forum-related activities, the district court may nonetheless maintain general personal jurisdiction over the defendant based on the defendant's business contacts within the forum state." *Springer v. Balough*, 96 F.Supp.2d 1250, 1255 (N.D. Okla. 2000) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) and citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415, 104 S.Ct.

1868, 80 L.Ed.2d 404 (1984)). Plaintiffs have not alleged any cause of action arising directly out of any activity of the Wyoming Defendants in New York, so in order to meet the minimum contacts test they must demonstrate that the Wyoming Defendants have “continuous and systematic general business contacts” with the forum state. *Springer*, 96 F.Supp.2d at 1255 (citing *Helicopteros*, 466 U.S. at 416). Plaintiffs in the instant action have failed to make the requisite showings. They have failed to demonstrate any contacts between the Wyoming Defendants and New York, let alone “continuous and systematic” contacts.

To the extent the Plaintiffs predicate their claim that this Court has personal jurisdiction over the Wyoming Defendants based on the federal nature of their claims, any such assertion is without merit. In the absence of a federal statute providing for nationwide personal jurisdiction, a plaintiff is still required to establish the existence of minimum contacts. *Springer*, 96 F.Supp.2d at 1256 (citing *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1201-02 (7th Cir. 1997)).

Therefore, this Court lacks personal jurisdiction over the Wyoming Defendants and the Plaintiffs’ AMENDED VERIFIED COMPLAINT against them must be dismissed pursuant to FED. R. CIV. P. 12(b)(2).

B. This Court is not the proper venue for this action against the Wyoming Defendants.

Plaintiffs are apparently alleging federal question jurisdiction. AMENDED VERIFIED COMPLAINT at ¶ 1 citing 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). District court venue for cases arising under federal law is governed by 28 U.S.C. § 1391(b), which 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.

This Court is not the proper venue for Plaintiffs’ claims against the Wyoming Defendants. Subsection (1) is clearly not applicable here, as all of the Defendants obviously do not reside in the same state. See *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 431 (2d Cir. 2005).

The determination of whether venue is proper under 28 U.S.C. § 1391(b)(2) involves a two-part inquiry: (1) the “nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims” are identified; and (2) the court determines “whether a

substantial part of those acts or omissions occurred in the district where suit was filed, whether ‘significant events or omissions material to [those] claim[s] ... have occurred in the district in question.’” *Id.* at 432 (quoting *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005)). “‘Substantiality’ for venue purposes is more a qualitative than a quantitative inquiry, determined by assessing the overall nature of the plaintiff’s claims and the nature of the specific events or omissions in the forum, and not by simply adding up the number of contacts.” *Daniel*, 428 F.3d at 432-33. Venue is not proper under this subsection because Plaintiffs have not alleged any acts or omissions, let alone “substantial” ones, by the Wyoming Defendants that occurred in the Northern District of New York. The acts or omissions giving rise to Plaintiffs’ “causes of action” is the Wyoming Defendants’ adoption of an electronic voting system. All of the acts necessary to that decision were taken in Wyoming. There are no acts or omissions relevant to the decision to adopt the particular voting process in Wyoming that occurred in the Northern District of New York. 28 U.S.C. § 1391(b)(2) simply does not provide a basis for venue in this Court for these claims by the Plaintiffs against Wyoming Defendants.

Finally, 28 U.S.C. § 1391(b)(3) is of no assistance to Plaintiffs. That subsection is a catch-all provision that is available when there is no federal district in which venue could be

established pursuant to subsections (b)(1) and (b)(2). See *Daniel*, 428 F.3d at 434-35. In this case, there is clearly another venue for Plaintiffs' claims: the district for Wyoming.

C. Defendant State of Wyoming is immune from suit under the Eleventh Amendment.

As a general rule, the Eleventh Amendment bars all suits in federal court against states and their agencies in the absence of consent by the state or express abrogation by Congress, if within its authority. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53-54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Plaintiffs do not suggest that the State of Wyoming has consented to this suit or cited any specific law of Congress abrogating immunity. Because the State of Wyoming is immune from suit, the Plaintiffs' claims against it should be dismissed with prejudice.

III. Conclusion

Plaintiffs have failed to allege sufficient facts to support the exercise of personal jurisdiction over the Wyoming Defendants, and there is no basis for this Court to conclude that it has such jurisdiction; therefore, the claims against the Wyoming Defendants should be dismissed pursuant to FED. R. CIV. P. 12(b)(2). It is equally clear that this Court does not have venue to hear the Plaintiffs' claims and, therefore, the claims against the Wyoming Defendants should be dismissed pursuant to FED. R. CIV. P. 12(b)(3). Finally, the State of

Wyoming is immune from suit in federal court under the Eleventh Amendment and the claims against it should be dismissed with prejudice.

WHEREFORE the Wyoming Defendants respectfully request this Court to dismiss Plaintiffs' AMENDED VERIFIED COMPLAINT.

DATED this 4th day of December, 2007.

**FOR AND ON BEHALF OF THE STATE OF
WYOMING AND MAX MAXFIELD,
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