

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

ROBERT SCHULZ (New York), et al.,)	
)	
<i>Plaintiffs,</i>)	
)	No. 1:07-cv-00943
v.)	LEK/DRH
)	
STATE OF NEW YORK, et al.,)	
)	
<i>Defendants.</i>)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF ALABAMA DEFENDANTS’
MOTION TO DISMISS PLAINTIFFS’ AMENDED VERIFIED COMPLAINT (DOC. 21)**

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I. INTRODUCTION

The State of Alabama and its Secretary of State, the Honorable Beth Chapman, submit this memorandum of law in support of their Motion to Dismiss the Plaintiffs’ Amended Verified Complaint. As explained below, this Court should grant the motion because: (1) it lacks personal jurisdiction over the State of Alabama and Secretary Chapman; and (2) the Eleventh Amendment to the United States Constitution forecloses any action against the State of Alabama.

II. BACKGROUND

Plaintiffs' Amended Verified Complaint names more than 100 defendants—each of the fifty States together with various election officials in each state. (*See* Doc. 21.) There are two named defendants from Alabama, the State of Alabama and Alabama's Secretary of State, Beth Chapman. (*Id.*)

The Amended Verified 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." (Doc. 21 ¶ 217.) In particular, Plaintiffs allege that the Defendants' use of "machines and/or computers" for vote casting and counting in elections is unconstitutional. (*Id.* ¶ 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 publicly announce the number of votes cast for candidates at each voting station. (*Id.* ¶¶ 219-20.)

Plaintiffs' Amended Verified Complaint ostensibly identifies three claims for relief. In the first claim, Plaintiffs allege that the voting procedures used by Defendants infringe on Plaintiffs' constitutional right to vote. In their second claim for relief, Plaintiffs allege that the voting procedures are a violation of Plaintiffs' "contractual rights," based on their assertion that "[f]ormally registering with the State to vote . . . is a contract." (Doc. 21 ¶ 252.) In what purports to be a "third cause of action," Plaintiffs submit a set of voting procedures that they allege to be constitutionally required 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 (or beyond) that are not “machine-free.” (*Id.* ¶ 268.)

The Amended Verified Complaint does not allege any contacts, election-related or otherwise, between the Alabama Defendants and the State of New York. Nor does it allege any acts by the Alabama Defendants that occurred within the State of New York. (*See generally id.*)

III. ARGUMENT

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

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, 784 (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 Alabama 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). Accordingly, 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 exercise of jurisdiction in such a case would comport with the Due Process Clause of the Fourteenth Amendment. *Bank Brussels Lambert*, 171 F.3d at 784; *Wing Shing Prods. (BVI), Ltd. v. Simaltex Manufactory Co.*, 479 F. Supp. 2d 388, 396 (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 Prods.*, 479 F. Supp. 2d at 397 (citation omitted).

New York’s long-arm statute does not reach the Alabama Defendants. That statute 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 tortuous act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortuous 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). Plaintiffs have failed to allege facts supporting the exercise of jurisdiction over the Alabama Defendants under any of these four prongs.¹

¹ The court may also exercise jurisdiction under New York’s general jurisdiction statute, N.Y. C.P.L.R. 301, if a defendant “does business” in New York, *see Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 191 (S.D.N.Y. 2000), by engaging in a “continuous and systematic course of conduct” there. *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990). The Amended Verified Complaint contains no allegations to that effect, and since CPLR 301 is an even weaker basis for this Court’s jurisdiction over the Alabama Defendants, we see no need for a protracted discussion of it.

First, they have failed to allege facts supporting jurisdiction under C.P.L.R. 302(a)(1). To determine the existence of jurisdiction under that subsection, 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 State of Alabama or Secretary Chapman has done anything at all within New York. Nor do they identify any connection between the State of Alabama and any actions that took place in New York. Ultimately, Plaintiffs challenge only the manner in which votes are counted in Alabama. Plaintiffs do not identify any way in which the process of counting votes in Alabama is connected to New York.

Second, Plaintiffs have failed to allege facts supporting jurisdiction over the Alabama Defendants under N.Y. C.P.L.R. 302(a)(2) or (a)(3). Plaintiffs do not allege that the Alabama Defendants committed a tort of any kind. *See Bank Brussels Lambert*, 305 F.3d at 125 (to satisfy section 302(a)(2) or (a)(3), a 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 Alabama Defendants committed any conduct, much less tortuous conduct, within New York. Nor do they allege any way in which that any conduct of the Alabama Defendants caused injury to a person or property within New York.

Finally, Plaintiffs have not alleged facts sufficient to support jurisdiction over the State of Alabama or Secretary Chapman under N.Y. C.P.L.R. 302(a)(4). Nowhere in the Amended

Complaint do Plaintiffs allege that the State of Alabama or Secretary Chapman, “owns, uses or possesses real property” within the State of New York.

In sum, the Amended Complaint does not—and cannot—allege any basis for New York’s long-arm statute, N.Y. C.P.L.R. 302, to confer jurisdiction upon its courts to reach the Alabama Defendants in this matter. Plaintiffs’ Amended Verified Complaint should therefore be dismissed on that ground alone.

Because there is no basis for jurisdiction under New York law, whether the exercise of jurisdiction over the Alabama Defendants would comport with federal Due Process requirements need not be determined. But even if the Court reaches that question (which it should not), the Due Process Clause clearly bars jurisdiction over the Alabama Defendants 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. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2183 (1985); *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (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, 105 S. Ct. at 2183 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-1240 (1958)). Plaintiffs have failed to allege that either the State of Alabama or Secretary Chapman has had any contact with New York, much less the “minimum contacts” sufficient to justify the exercise of personal jurisdiction. Accordingly, this Court’s exercise of personal jurisdiction over the Alabama Defendants would violate the federal Due Process Clause, and the Amended Verified Complaint should be dismissed for that additional reason.

B. The State of Alabama is immune from suit under the Eleventh Amendment to the United States Constitution.

Finally, this Court should dismiss all of the Plaintiffs' claims against the State of Alabama because it is immune from suit under the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984).

IV. CONCLUSION

For the foregoing reasons, the Alabama Defendants respectfully request that this action be dismissed as to the State of Alabama and Secretary Chapman.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on the 4th day of December, 2007, I served the foregoing motion in compliance with this Court's Order of October 30, 2007 (Doc. 18 at ¶3). I filed this document electronically (using the Court's CM/ECF system), and also by regular mail to the Lead Plaintiffs' Representative using the address below.

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