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

ROBERT L. SCHULZ, et al.,)	
)	
Plaintiffs,)	
)	No. 07-CV-0943
v.)	LEK/DRH
)	
STATE OF NEW YORK, et al.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM IN SUPPORT OF
DEFENDANT STATE OF KANSAS AND
KANSAS SECRETARY OF STATE RON THORNBURGH'S
MOTION TO DISMISS**

NATURE OF THE CASE

The plaintiffs have brought suit alleging a right under the United States Constitution, enforceable under 42 U.S.C. 1983, to cast and count paper ballots. The defendants are the fifty states and their respective Chief Election Officers who have been named in their individual and official capacities. The State of Kansas and its Chief Election Officer, Secretary of State Ron Thornburgh, move to dismiss with prejudice based on various constitutional and statutory principles pursuant to F.R.Civ.P. Rule 12(b).

**I.
STANDARD OF REVIEW**

Dismissal of a cause of action for failure to state a claim is appropriate only where it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir., 1996), or where an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The pleadings are liberally construed, and all reasonable inferences are viewed in favor of the plaintiff. F.R.C.P. Rule 8(a); *Fuller*, 86 F.3d 1020. All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true. *Jojola v. Chavez*, 55 F.3d 488, 494 n. 8 (10th Circuit, 1995) (citing *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir., 1984)). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

**II.
ARGUMENT AND AUTHORITY**

**A.
THE ELEVENTH AMENDMENT**

**1.
THE STATE OF KANSAS**

The plaintiff has brought suit against the State of Kansas. The State of Kansas is a sovereign government under the United States and Kansas Constitutions. The State of Kansas is immune from suit under the Eleventh Amendment to the United States Constitution. As stated in *Whayne v. State of Kansas*, 980 F. Supp. 387 (1997):

The court has no jurisdiction over the plaintiff's claims against the State of Kansas. The Eleventh Amendment confers sovereign immunity on the states that functions as "a constitutional limitation

on the federal judicial power” of Article III courts. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). It affords absolute immunity from suit in federal courts for states and their agencies regardless of the legal or equitable nature of the relief sought. *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 588 (10th Cir.1994).

The State of Kansas is clearly entitled to Eleventh Amendment immunity. The State of Kansas is immune from suit in the United States District Courts. As such, the State of Kansas is entitled to be dismissed.

2.
SECRETARY OF STATE THORNBURGH
IN HIS INDIVIDUAL CAPACITY

The plaintiffs have brought suit against Kansas Secretary of State Ron Thornburg in his “individual and official capacities.” The plaintiffs want the court to order Secretary of State Thornburgh to conduct caucuses, primary elections, general elections and all other elections using paper ballots that are counted for public viewing. Complaint page 50.

A sovereign entity can only carry out its functions through the individuals that are employed by it. The individual defendants in their official capacity are carrying out the duties of the sovereign. The United States District Court for the District of Kansas stated in *Olson v. Finney*, 885 F. Supp 1480 (1995):

A suit against a state official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office, accordingly it is no different than a suit against the state itself. *Will v. Michigan Department of State Police*, 491 U.S. 58, 64, 71, 109 S.Ct. 2304, 2308-09, 2312, 105 L.Ed.2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165-166, 105 S.Ct. 3099, 3104-05, 87 L.Ed.2d 114 (1985).

The plaintiffs seek injunctive relief from Ron Thornburgh in his individual capacity. As an individual, Ron Thornburgh, does not have the power to order the State of Kansas to conduct its elections using paper ballots. As such, Ron Thornburgh, in his individual capacity cannot give the plaintiffs the relief they seek. Therefore, Ron Thornburgh, in his individual capacity, must be dismissed as a party.

B.
THE SOVEREIGN DEFENDANTS ARE NOT
“PERSONS” UNDER 42 U.S.C. 1983.

1. The State of Kansas

The plaintiffs generally allege this case has been brought pursuant to 42 U.S.C. 1983. Because this is a lawsuit against a sovereign defendant, the State of Kansas, and the other sovereign States, 42 USC 1983 does not apply because these defendants are not “persons” as defined by law. See *Hafer v. Melo*, 502 U.S. 21 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985). Accordingly, the court should grant the State of Kansas’ motion to dismiss because as a sovereign defendant it is not a “person” pursuant to 42 USC 1983.

2. Secretary of State Thornburg

The plaintiffs’ have brought suit against Secretary of State Thornburgh in his official capacity seeking an order from this court to the Secretary of State ordering him to conduct elections and count only paper ballots.

The Supreme Court has held that neither a state nor state agencies are “persons” within the meaning of 42 U.S.C. § 1983. *Will*, 491 U.S. at 64, 109 S.Ct. at 2308-09. Accordingly, state officials sued in their official capacities are not “persons” within the meaning of 42 U.S.C. § 1983. *Will*, 491 U.S. at 71, 109 S.Ct. at 2312.

Accordingly, Kansas Secretary of State Thornburgh must be dismissed from this case with prejudice.

C.

**PERSONAL JURISDICTION OVER THORNBURGH
AND THE STATE OF KANSAS IS LACKING.**

There are no factual allegations in the plaintiff's complaint which would establish that defendant Ron Thornburgh, Kansas Secretary of State, has had the requisite "minimum contacts" within the Northern District of New York to satisfy constitutional due process under the seminal U.S. Supreme Court decisions regarding personal jurisdiction, namely *International Shoe Co. v. Washington*, 325 U.S. 310 (1945), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 295 (1980), and their progeny.

In *OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1091 (10th Cir. 1998), the Tenth Circuit stated a two-part test for personal jurisdiction. The first part is whether defendant has such minimum contacts with the forum state "that he should reasonably anticipate being haled into court there," because he has "purposefully directed [his] activities at the residents of the forum." Assuming the first part of the test is established and the defendant does have minimum contacts with the forum, the second part of the test is whether the exercise of personal jurisdiction over this defendant with minimum contacts offends "traditional notions of fair play and substantial justice." See also *Bank Brussels Lambert v. Fiddler, Gonzalez and Rodriquez*, 305 F.3d 120 (2002).

Schulz' complaint meets neither prong of the two-part test as to Secretary Thornburgh. The Kansas Secretary of State could not reasonably anticipate being haled into court in the Northern District of New York, especially not with regard to the State's own election laws. The complaint does not allege that Secretary Thornburgh has purposely directed any activities at the residents of

New York or any state other than Kansas. Schulz has not alleged a single contact by Thornburgh with New York that would subject him to personal jurisdiction here. To find personal jurisdiction over Secretary Thornburgh in New York in this action would offend “traditional notions of fair play and substantial justice” and constitutional due process standards.

The United States District Court for the Northern District of Oklahoma faced a similar situation in *Springer v. Ballough*, 96 F.2d 1250 (N.D.OK., 2000) when a complainant brought suit in the Northern District of Oklahoma seeking to have his name placed on the ballot for President of the United States in Kansas. The United States District Court dismissed the case showing the Secretary of State of Kansas did not have sufficient contacts with a judicial district which is adjacent to Kansas for the court to have personal jurisdiction over that defendant. The Northern District of New York’s Northern neighbor is Canada, not Kansas, and this court does not have sufficient contacts for this plaintiff to obtain personal jurisdiction over either the State of Kansas or Secretary of State Ron Thornburgh.

When a motion pursuant to Fed. R. Civ. P. 12(b)(2) is filed, plaintiff also bears the burden of proving personal jurisdiction over the defendant. *Kuenzle v. HTM Sport-und Freizeit gerate A.G.*, 102 F.3d 453, 456 (10th Cir. 1996). This he cannot do. This action should be dismissed with prejudice against Secretary Thornburgh for lack of personal jurisdiction.

CONCLUSION

These defendants, the State of Kansas and its Secretary of State Ron Thornburgh, are entitled to dismissal of this matter with prejudice. The State of Kansas is immune from suit in this court pursuant to the Eleventh Amendment to the United States Constitution. These defendants are not “persons” under 42 U.S.C. 1983. This court does not have sufficient contacts with these defendants

for this court to obtain “personal” jurisdiction of these parties. For all the above reasons, the State of Kansas and its Secretary of State Ron Thornburgh, move to dismiss this matter with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 2007, a true and correct copy of the above and foregoing was filed electronically with the clerk of the court using the CM/ECF system which will send a notice of electronic filing to the following any counsel of record as follows:

AAG Bruce J. Boivin
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I further certify that on December 10, 2007 I mailed the foregoing, by first class mail to the non-CM/ECF participant:

Robert L. Schulz
2458 Ridge Road
Queensbury, NY 12804

s/Wm. Scott Hesse
Wm. Scott Hesse