

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT SCHULZ, *et al*,
Plaintiffs

v.

STATE OF NEW YORK, *et al*,
Defendants

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CASE NO: 1:07-CV-0943 LEK/DRH

Motion to Dismiss Plaintiffs' Amended Complaint

COME NOW the State of Mississippi and Eric Clark, Mississippi Secretary of State ("Mississippi Defendants"), by and through counsel, the Office of the Attorney General for the State of Mississippi, and hereby move this Court to dismiss the Plaintiffs' amended complaint against the Mississippi Defendants as soon as thereafter as is convenient for this Court. In support of this motion, the Mississippi Defendants state the following:

1. Pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(2), this Court does not have personal jurisdiction over the Mississippi Defendants, and therefore, this Court should dismiss this action against the Mississippi Defendants.

2. Pursuant to FRCP 12(b)(3), this Court is not the proper venue to sue the Mississippi Defendants, and therefore, this Court should dismiss this action against the Mississippi Defendants.

3. The Mississippi Secretary of State does not have the statutory authority to control what, if any, type of voting machine is used in local, state and federal elections held in Mississippi. Therefore, pursuant to FRCP 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted and this action must be dismissed.

4. The Mississippi Secretary of State does not have the statutory authority to require Mississippi counties (or other political subdivisions) to use or not use voting machines at their polling places for any local, state and federal elections. Such responsibility resides with the respective counties (or other political subdivisions) in Mississippi. Therefore, pursuant to FRCP 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted and this action must be dismissed.

5. Pursuant to the 11th Amendment of the United States Constitution, the State of Mississippi is immune from suit, and therefore, Plaintiffs' claim against the State of Mississippi must be dismissed.

6. A memorandum of law in support of this motion is filed concurrently herewith.

7. This is a dispositive motion. Therefore, there is no requirement that concurrence be sought.

8. Attached to this Motion to Dismiss, please find the Mississippi Defendants' submission of an Affidavit from the Mississippi Secretary of State, Eric Clark, attached hereto as "Exhibit A".

WHEREFORE, it is respectfully requested that this Court order as follows:

A. Grant the Mississippi Defendants' Motion to Dismiss

Plaintiffs' amended complaint; and

B. For such other and further relief as is necessary.

Respectfully submitted,

MISSISSIPPI DEFENDANTS

By their attorneys,

Jim Hood
ATTORNEY GENERAL

/s/ George W. Neville
George W. Neville
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Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I, George W. Neville, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date caused to be electronically filed, a true and correct copy of the above ***Motion to Dismiss Plaintiffs' Amended Complaint*** with the Clerk of the Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to counsel for the other named defendants. I further certify that a copy of the foregoing document was served upon the following by mailing a true and correct copy to the following non-ECF participant who has been designated by the Court as the "Lead Plaintiff's Representative":

Robert L. Schulz
2458 Ridge Road
Queensbury, NY 12804

THIS the 14th day of December, 2007.

s/ George W. Neville
George W. Neville