

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

ROBERT L. SCHULZ (New York), et al., *

Plaintiffs *

v. *

STATE OF NEW YORK, et al., *

Defendants *

Case No. 07-CV-0943 LEK/DRH

MEMORANDUM IN SUPPORT OF MISSISSIPPI DEFENDANTS'
MOTION TO DISMISS

Office of the Attorney General
State of Mississippi
Post Office Box 220
Jackson, MS 39205
(601) 359-3680

TABLE OF CONTENTS

I. BRIEF FACTUAL BACKGROUND..... 2

II. ARGUMENT IN SUPPORT OF DISMISSAL..... 2

 A. Plaintiffs lack personal jurisdiction to bring this action against
 the Mississippi Defendants. 2

 (1) Plaintiffs' amended complaint fails to establish jurisdiction
 under New York's long-arm statute. 3

 (2) Plaintiffs' amended complaint fails to establish jurisdiction
 under the Due Process clause of the Fourteenth Amendment.
 4

 B. This Court is not the proper venue to bring this action against
 the Mississippi Defendants. 5

 C. Motion to Dismiss on the basis that the Secretary of State
 of Mississippi has no authority to control what type of voting
 machines are used in Mississippi. 7

 D. Motion to Dismiss on the basis that the individual Mississippi
 Counties (and other political subdivisions) independently determine
 what voting machines will be used at their polling places for all local,
 state and federal elections.
 8

 E. Defendant State of Mississippi is immune from suit under
 the Eleventh Amendment 8

III. CONCLUSION 9

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

*
ROBERT SCHULZ, *et al*,
Plaintiffs

*
*

v. *
*

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

STATE OF NEW YORK, *et al*,
Defendants

*
*

*

MEMORANDUM IN SUPPORT OF MISSISSIPPI DEFENDANTS'
MOTION TO DISMISS

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 to dismiss the Plaintiffs' amended complaint on the grounds that: (1) pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(2), this Court does not have personal jurisdiction over the Mississippi Defendants; (2) pursuant to FRCP 12(b)(3), this Court constitutes improper venue as to the Mississippi Defendants; (3) pursuant to FRCP 12(B)(6), Plaintiffs have failed to state a claim upon which relief may be granted against the Mississippi Secretary of State because the Mississippi Secretary of State does not have the statutory authority to direct or approve particular voting machines in Mississippi; (4) pursuant to FRCP 12(B)(6), Plaintiffs have failed to state a claim upon which relief may be granted because the Mississippi Secretary of State does not have the statutory authority to require

or otherwise approve voting districts in Mississippi to use or not use voting machines; and (5) pursuant to the Eleventh Amendment, the State of Mississippi is immune from suit. Mississippi would ask this Honorable Court to incorporate appropriate arguments set forth in the Nebraska Defendants' Memorandum in support of their Motion to Dismiss to the Mississippi Defendants' arguments. In support of this motion, the Mississippi Defendants state the following:

I. BRIEF FACTUAL BACKGROUND

Plaintiffs filed this amended complaint alleging three causes of action against State Defendants, including the Mississippi Defendants. The allegations against each of the Defendants relate to Plaintiffs' objection to the Defendants' use of certain voting machines in elections held in the States of each of the named Defendants.

Plaintiffs request that this Court permanently enjoin the Defendants from conducting elections: (1) which are not "open, verifiable, transparent, machine-free, computer-free," Pls' Amended Complt. at ¶ 268(a); (2) which do not "rely exclusively on paper ballots, hand marked and hand-counted," *id.* at ¶ 268(b); and (3) which do not keep paper ballots in "full public view until the results of the hand counting is publicly announced at that vote station." *id.* at ¶ 268(c).

II. ARGUMENT IN SUPPORT OF DISMISSAL

A. Plaintiffs lack personal jurisdiction to bring this action against the Mississippi Defendants

The party seeking to invoke the court's jurisdiction bears the burden of establishing by competent proof that jurisdiction exists. See Computer Associates Intern., Inc. v. Altai, 126 F.3d 365, 370-71 (2nd Cir. 1997). "It has

long been the rule that the standard to be applied in determining whether a federal district court has jurisdiction over the person in diversity cases is the law of the state where the court sits.” Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir.1989). “The exercise of 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 Associates Intern., Inc., 126 F.3d at 370 (citing Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1025-26 (2d Cir.1997).

(1) Plaintiffs’ amended complaint fails to establish jurisdiction under New York’s long-arm statute.

New York’s long arm statute provides in pertinent part:

(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

...

4. owns, uses or possesses any real property situated within the state.

...

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. C.P.L.R. § 302(a).

Plaintiffs’ amended complaint fails to show that this federal court has jurisdiction over the Mississippi Defendants under New York’s long arm statute, N.Y. C.P.L.R. § 302(a). The Mississippi Defendants do not transact business or

contract anywhere to supply goods or services in New York. Further, the Mississippi Defendants do not own, use or possess any real property in New York.

(2) Plaintiffs' amended complaint fails to establish jurisdiction under the Due Process clause of the Fourteenth Amendment.

The Due Process clause of the Fourteenth Amendment limits the exercise of personal jurisdiction to persons having certain "minimum contacts" with the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). "A court may exercise personal jurisdiction only over a defendant whose 'conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there.'" Computer Associates Intern., Inc., 126 F.3d at 370-71 (quoting Burger King Corp., 471 U.S. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))). "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.'" Id. at 371 (quoting Burger King Corp., 471 U.S. at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))).

In this case, the Mississippi Defendants do not reside in New York. Moreover, none of the allegations contained in the amended complaint relate to the Mississippi Defendants performing any action in New York. The Mississippi Defendants could not reasonably have anticipated litigation in New York as a result of the Plaintiffs' allegations. Therefore, this Court lacks personal

jurisdiction over the Mississippi Defendants. Accordingly, the Plaintiffs' amended complaint against the Mississippi Defendants must be dismissed.

B. This Court is not the proper venue to bring this action against the Mississippi Defendants

This Court should grant the Mississippi Defendants' motion to dismiss because this Court is not the proper venue for this action. "The 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 Western United Corporation, 443 U.S. 173, 184 (1979). "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy is to be given a liberal construction." Olberding v. Illinois Central R. Co., 346 US 338, 340 (1953). Therefore, courts are required to strictly construe the venue statute. Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2nd Cir. 2005) (citing to Olberding, 346 U.S. at 340).

Because the Plaintiffs' claim apparently "arises under" federal law, venue must be determined under 28 U.S.C. §1391(b), which provides in pertinent part:

(b) 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.

28 U.S.C. §1391(b)

The Plaintiffs have failed to show that they meet the requirements under 28 U.S.C. §1391(b). Subsection (1) does not apply because all of the named Defendants reside in different states. Under subsection (2), with respect to the Plaintiffs' claim against the Mississippi Defendants, no part of the underlying events took place in New York and no part of any Mississippi property subject to the action is situated in New York. See Gulf Ins.Co., 417 F.3d at 357 ("district courts to take seriously the adjective 'substantial.'").

Finally, the Plaintiffs have failed to show that subsection (3) provides them with proper venue. Although one of the Defendants, i.e., the New York State Board of Elections, see Pls' Amended Compl. at ¶160, can "be found" in New York, New York is not the proper venue for the Mississippi Defendants because the Plaintiffs have failed to show that there "is no district in which the action may otherwise be brought." See 28 U.S.C. §1391(b)(3); H.R. Rep. No. 101-734 at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875; see generally, McDonald v. General Accident Insurance Co., 1996 WL 590722 (N.D.N.Y. 1996).

Here, because three named Plaintiffs and the Mississippi Defendants reside in Mississippi, and because the alleged events giving rise to the Plaintiffs' claim against the Mississippi Defendants allegedly occurred, or will allegedly occur in Mississippi, to the extent that venue is proper in any federal court for adjudicating Plaintiffs' claims against the Mississippi Defendants, it must be the United States District Court for the Southern District of Mississippi.¹ Therefore,

¹ This action has not been, and could not be brought as a class action as the parties are individual pro se plaintiffs acting without counsel and therefore cannot act as counsel for a class. The plaintiffs have also not complied with the requirements for obtaining designation as multidistrict litigation under 28 USC § 1407. See Frank v. Aaronson, 120 F.3d 10 (2nd Cir. 1997); see also Phillips v. Tobin, 548 F.2d 408, 412 (2nd Cir. 1976).

pursuant to 28 U.S.C. §1391(b), Plaintiffs claim against the Mississippi Defendants cannot be brought in this Court. Accordingly, this Court should grant the Mississippi Defendants' motion to dismiss.

C. Motion to Dismiss on the basis that the Secretary of State of Mississippi has no authority to control what type of voting machines are used in Mississippi

Plaintiffs request injunctive relief against the Mississippi Secretary of State. See Pls' Amended Compl. at ¶¶ 268 (a), (b), and (c). This request is misplaced. The Mississippi Secretary of State does not have the authority under Mississippi law to select what type of voting machines the counties (thereby also other political subdivisions) in Mississippi use, or when alternatively, paper ballots, in placing, counting and/or processing votes for local, state or federal elections. See Miss. Code Ann. §§23-15-391 and 23-15-405 (Rev. 2007).

Because the Mississippi Secretary of State does not have authority to direct the use of specific voting machines in Mississippi, Plaintiffs have inappropriately named him as a Defendant. Therefore, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. See Chapman v. New York State Div. for Youth, 2005 WL 2407548 (2nd Cir. 2005) (citing Conley, 355 U.S. at 45-46 (1957)); Gebhardt v. Allspect, Inc., 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) (In order to avoid dismissal, Plaintiffs must do more than plead mere "conclusory allegations or legal conclusions masquerading as factual conclusions."). Accordingly, this Court should dismiss, Plaintiffs'

amended complaint against Mississippi's Secretary of State.²

D. Motion to Dismiss on the basis that the individual Mississippi counties independently determine whether they are going to use voting machines, and what type, at their polling places for all local, state and federal elections.

Mississippi is comprised of 82 counties. Pursuant to Miss. Code Ann. §§23-15-391 (Rev. 2007), these individual counties, by and through their respective Board of Supervisors, "... shall "utilize voting machines, electronic voting systems, optical mark reading equipment or direct recording electronic voting equipment ... [but t]he election commissioners may designate elections to be administered by paper ballots where the election commissioners determine that administration of an election by paper ballot will be less expensive"

Because the Mississippi Secretary of State does not regulate or otherwise control which or when voting machines are permitted for use in Mississippi, and does not regulate or control whether a Mississippi county opts to use or not use paper ballots in conducting local, state and federal elections, Plaintiffs have inappropriately named the Mississippi Secretary of State as a Defendant. Accordingly, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. See Chapman, 2005 WL 2407548.

E. Defendant State of Mississippi is immune from suit under the Eleventh Amendment.

² Even if Plaintiffs' named each of the eighty-two Mississippi counties and their respective governing Boards of Supervisors and Election Commissioners as defendants in this case, Plaintiffs' claim would fail under the jurisdictional and venue arguments set forth above.

The Eleventh Amendment to the United States Constitution generally bars claims in federal court against the states and their agencies. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Under Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), "a plaintiff may sue a state official acting in his official capacity – notwithstanding the Eleventh Amendment – for prospective, injunctive relief from violations of federal law." In re Deposit Ins. Agency, 482 F.3d 612, 617 (2d Cir. 2007) (internal quotation marks omitted). Importantly, however, the ruling in Ex Parte Young does not allow injunctive action against a state, as opposed to state officers. Ashe v. Board of Elections, 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. 1988); see also NAACP v. California, 511 F.Supp. 1244, 1250 (E.D. Cal. 1981), aff'd. 711 F.2d 121 (9th Cir. 1982).

In this case, Plaintiffs have named the State of Mississippi as a defendant. Because the State of Mississippi is immune from suit under the Eleventh Amendment, the claims against the State of Mississippi should be dismissed.

III. CONCLUSION

The Mississippi Defendants respectfully request that this Honorable Court:

- (1) Dismiss the Plaintiffs' amended complaint as against the Mississippi Defendants;
- (2) Grant such further relief as it may deem just and equitable.

Respectfully submitted,

MISSISSIPPI DEFENDANTS

By their attorneys,

Jim Hood
ATTORNEY GENERAL

/s/ George W. Neville
George W. Neville
Miss. Bar #3822; NY Bar#106515
Special Assistant Attorney General
Post Office Box 220
Jackson, MS 39205
(601) 359-3680
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 ***Memorandum in Support of Mississippi Defendants' Motion to Dismiss*** 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