IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ (New York), et al.,	*	
Plaintiffs	*	
v.	*	Case No. 07-CV-0943 LEK/DRH
STATE OF NEW YORK, et al.,	*	
Defendants	*	

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MEMORANDUM IN SUPPORT OF STATE OF HAWAI'I DEFENDANTS' MOTION TO DISMISS

The State of Hawai'i and Rex M. Quidilla, Acting Chief Elections Officer for the State of Hawai'i (collectively, the "Hawai'i Defendants"), by and through their counsel, the Department of the Attorney General for the State of Hawai'i, hereby move to dismiss Plaintiffs' amended complaint on the grounds that: (1) pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6), this Court does not have subject matter jurisdiction because the Hawai'i Defendants are immune from suit pursuant to the Eleventh Amendment and the amended complaint thus fails to state a claim upon which relief can be granted; (2) pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(2), this Court does not have personal jurisdiction over the Hawai'i Defendants; and (3) pursuant to FRCP 12(b)(3), this Court constitutes improper venue as to the Hawai'i Defendants. In support of this motion, the Hawai'i Defendants state the following:

I. BRIEF FACTUAL BACKGROUND

Plaintiffs filed the amended complaint alleging three causes of action against all State Defendants, including the Hawai'i 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

In the context of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(l) and for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), the court must accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiffs. McEvoy v. Spencer, 124 F.3d 92, 95 (2d Cir. 1997); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088 (2d Cir. 1995). The court may not dismiss a complaint unless "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." Still v. Debuono, 101 F.3d 888, 891 (2d Cir. 1996).

A complaint must be dismissed where relief could not be granted under any set of facts alleged in the pleadings. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

When immunity defenses are presented, moreover, Plaintiffs must specifically plead facts to overcome immunity because a:

> [d]ecision of this purely legal question permits a court expeditiously to weed out suits . . . without requiring a defendant who rightly claims . . . immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long and drawn out lawsuit.

Siegert v. Gilley, 500 U.S. 226, 232 (1991). This defense is immunity from suit itself, rather than a mere defense to liability. Id. at 233. The party seeking to invoke the jurisdiction of the court bears the burden of establishing that he has met the requirements for standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

A. Plaintiffs lack personal jurisdiction to bring this action against the Hawai'i 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 Hawai'i Defendants under New York's long arm statute, N.Y. C.P.L.R. § 302(a). The Hawai'i Defendants do not transact business or contract anywhere to supply goods or services in New York. Further, the Hawai'i Defendants do not own, use or possess any real property in New York. See, declaration of Rex M. Quidilla, attached.

(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 haled 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, Rex M. Quidilla, acting Chief Elections Officer for the State of Hawai'i, does not reside in New York. See, declaration of Rex M. Quidilla, attached. Moreover, none of the allegations contained in the amended complaint relate to any act performed by either of the Hawai'i Defendants or to any business conducted by them in New York. In short, the Hawai'i 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 Hawai'i Defendants. Accordingly, the Plaintiffs' amended complaint against the Hawai'i Defendants must be dismissed.

B. This Court is not the proper venue to bring this action against the Hawai'i Defendants

This Court should grant the Hawai'i 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 statue. 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 Hawai`i Defendants, no part of the underlying events took place in New York and no part of any Hawai'i 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 Complt. at ¶160, can "be found" in New York, New York is not the proper venue for the Hawai'i 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 Defendant Rex M. Quidilla, acting Chief Election Officer for the State of Hawai'i, reside in Hawai'i, and because the alleged events giving rise to the Plaintiffs' claim against the Hawai`i Defendants allegedly occurred, or will allegedly occur in Hawai'i, to the extent that venue is proper in any federal court for adjudicating Plaintiffs' claims against the Hawai'i Defendants, it must be the United States District Court for the District of Hawai'i.[1] Therefore, pursuant to 28 U.S.C. §1391(b), Plaintiffs claim against the Hawai'i Defendants cannot be brought in this Court. Accordingly, this Court should grant the Hawai'i Defendants' motion to dismiss.

C. Defendant State of Hawai'i is immune from suit under the Eleventh Amendment.

Pursuant to the Eleventh Amendment to the United States Constitution, the State of Hawai'i is absolutely immune from suits brought in federal court by citizens of another state or by its own citizens. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (citing Hans v. Louisiana, 134 U.S. 1 (1890). This immunity bars all such suits against the State of Hawai'i, even if the nature of the relief sought is injunctive, declaratory, and/or monetary. Pennhurst, 465 U.S. at 100-01; Cory v. White, 457 U.S. 85, 91 (1982). 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." Importantly, however, the ruling in Ex Parte Young does

[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).

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 Hawai'i as a defendant. Because the State of Hawai'i is immune from suit under the Eleventh Amendment, the claims against the State of Hawai'i should be dismissed.

Suits against state officials in their official capacity are in reality suits against the State, and are thus similarly barred. As noted in Pennhurst,

> the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.

465 U.S. at 89.

The Court further noted that a lawsuit asserted against state officials is barred by the Eleventh Amendment if

> the judgment . . . would interfere with the public administration or if the effect of the judgment would be to restrain the Government from acting or to compel it to act.

Id. (internal citations and quotations omitted).

Plaintiffs are seeking relief against the State of Hawai'i and the State's Chief Election Officer with respect to his position rather than against him individually. As such, this lawsuit is in reality asserted against the State of Hawai'i and thus barred by the Eleventh Amendment. Pennhurst; Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). Neither the defendant State nor a state officer sued in an official capacity is a "person" within the meaning of 42 U.S.C. section 1983 actions.

To the extent that the Amended Complaint may be construed against the State Defendant (Chief Election Officer) in his individual capacity, he enjoys qualified immunity from Plaintiffs'

claims. Nixon v. Fitzgerald, 457 U.S. 371 (1982); Harlow v. Fitzgerald, 457 U.S. 800 (1982). Any claims against the State's Chief Election Officer for prospective injunctive relief are barred because of lack of personal jurisdiction over him in the federal district courts of New York.

CONCLUSION

The Hawai'i Defendants respectfully request that this Honorable Court:

(1) Dismiss the Plaintiffs' amended complaint as against the Hawai'i Defendants; and

(2) Grant such further relief as it may deem just and equitable.

Respectfully submitted,

THE HAWAI'I DEFENDANTS
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