

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARGARITA LOPEZ TORRES, STEVEN BANKS, :
C. ALFRED SANTILLO, JOHN J. MACRON, :
LILI ANN MOTTA, JOHN W. CARROLL, :
PHILIP C. SEGAL, SUSAN LOEB, DAVID J. :
LANSNER and COMMON CAUSE/NY, :

04 Civ. 1129 (JG) (SMG)

Plaintiffs, :

-against- :

NEW YORK STATE BOARD OF ELECTIONS; :
NEIL W. KELLEHER, CAROL BERMAN, HELENA :
MOSES DONOHUE, and EVELYN J. AQUILA, :
in their official capacities as Commissioners of the :
New York State Board of Elections, :

**ANSWER TO FIRST
AMENDED COMPLAINT**

Defendants, :

-and- :

NEW YORK COUNTY DEMOCRATIC COMMITTEE, :
NEW YORK REPUBLICAN STATE COMMITTEE, :
ASSOCIATION OF JUSTICES OF THE SUPREME :
COURT OF THE STATE OF NEW YORK, :
ASSOCIATION OF JUSTICES OF THE SUPREME :
COURT OF THE CITY OF NEW YORK, and :
JUSTICE DAVID DEMAREST, individually, :
and as President of the State Association, :

Defendant-Intervenors, :

-and- :

ATTORNEY GENERAL OF THE STATE :
OF NEW YORK, :

Statutory Intervenor. :

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ELIOT SPITZER, Attorney General of the State of New York, statutory intervenor in this action, as and for his answer to the first amended complaint, filed on March 20, 2006, alleges:

1. That the allegations contained in paragraphs 1 and 27 of the first amended complaint constitute a characterization of the case and/or of the first amended complaint to which no response is required, but to the extent that an answer is made, denies knowledge or information sufficient to form a belief in respect to those allegations.

2. Denies the allegations in paragraphs 2, 6, 23, 24, 25, 26, 30, 31, 32, 35, 37, 38, 40, 41, 42, 43, 50, 67, 80, 81, 82, 83, 84, 88 and 89 of the first amended complaint, except that, to the extent that the allegations contained in those paragraphs purport to refer to various provisions of the Constitution and statutes of the State of New York, respectfully refers the Court to such Constitution and statutes for the terms and contents thereof.

3. Respecting paragraph 3 of the first amended complaint, denies the allegations in the first three lines of paragraph 3, denies the allegations set forth in the first, fourth, sixth and seventh full sentences of paragraph 3, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second, third, fifth and eighth full sentences of paragraph 3, and avers that paragraph 3 fails to conform to Rule 8(e)(1) of the Federal Rules of Civil Procedure.

4. Denies the allegations set forth in paragraphs 4, 5, 28, 33, 34, 39, 49, 51, 52, 57, 61, 72, 76, 79, 85, 86, 87, 91, 92, 95, 97, 100, 101, 102, 103, 105, 106, 107, 108, 110, 111, 112, 113 and 114 of the first amended complaint.

5. Denies knowledge or information sufficient to form a belief in respect to the truth of the allegations contained in paragraphs 7, 10, 11, 13 and 17 of the first amended complaint, except as to the contents of public records purportedly referred to in such paragraphs, and as to any such public records respectfully refers the Court to the specific contents thereof.

6. Denies knowledge or information sufficient to form a belief in respect to the truth of the allegations set forth in paragraphs 12, 14, 15, 16, 18, 19, 29, 44, 45, 46, 47, 48, 53, 54, 58, 59, 62, 63, 64, 65, 66, 69, 70, 71, 90, 98 and 99 of the first amended complaint.

7. Denies the allegations in paragraph 20 of the first amended complaint, except admits that defendant the New York State Board of Elections (the "State Board of Elections") is an agency within the Executive Department of the State of New York, created by N.Y. Election Law art. 3, § 3-100, with powers and duties as prescribed by law.

8. Denies the allegations contained in paragraph 21 of the first amended complaint, except admits that defendants Neil W. Kelleher, Evelyn J. Aquila and Helena Moses Donohue are three of the four Commissioners of the State Board of Elections ("defendant Commissioners"), avers that the office of Commissioner of the State Board of Elections formerly held by named defendant Carol Berman is now held by Douglas A. Kellner, and admits that defendant Commissioners are sued only in their official capacities.

9. Avers that the allegations set forth in paragraph 22 of the first amended complaint are not the proper subject matter of a pleading according to Rule 8 of the Federal Rules of Civil Procedure, and otherwise denies knowledge or information sufficient to form a belief with respect to the allegations in paragraph 22.

10. Denies the allegations contained in paragraphs 36, 55, 56, 60, 68, 73, 74, 75, 77, 78, 93, 94 and 96 of the first amended complaint, except as to the contents of public records purportedly referred to therein, and as to any such public records respectfully refers the Court to the specific contents thereof.

FIRST DEFENSE

11. The first amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

12. Defendant State Board of Elections is an agency within the Executive Department of the State of New York, created by N.Y. Election Law art. 3, § 3-100.

13. As an agency of the State of New York, defendant State Board of Elections is the *alter ego* of the State of New York.

14. As a matter of law, all claims in the first amended complaint as against defendant State Board of Elections are claims against the State of New York.

15. By reason of the foregoing, all claims in the first amended complaint as against defendant State Board of Elections are barred by the Eleventh Amendment to the United States Constitution.

16. The Court therefore lacks federal subject matter jurisdiction over defendant State Board of Elections.

THIRD DEFENSE

17. As set forth in paragraph 8 of the first amended complaint, this is an action pursuant to 42 U.S.C. § 1983 (“§ 1983”).

18. As a matter of law, no sovereign state is a “person” within the meaning of § 1983, and that section creates no remedy against a state or any agency of a state.

19. As set forth in paragraphs 12 and 13 of this answer, defendant State Board of Elections is an agency of the State of New York, and the *alter ego* of the State of New York.

21. Defendant State Board of Elections therefore is not a “person” within the meaning of § 1983.

22. By reason of the foregoing, the Court lacks federal subject matter jurisdiction over defendant State Board of Elections.

FOURTH DEFENSE

23. By the terms of the first amended complaint, defendant Commissioners are sued only in their official capacities.

24. As a matter of law, a suit against a state official for damages is a suit against the state.

25. By reason of the foregoing, all claims in the first amended complaint for damages as against defendant Commissioners are barred by the Eleventh Amendment to the United States Constitution.

26. The Court therefore lacks federal subject matter jurisdiction over defendant Commissioners for purposes of any claim for damages purported to be alleged in the first amended complaint.

FIFTH DEFENSE

27. The first amended complaint fails to allege that any conduct of defendant Commissioners violated clearly established federal statutory or constitutional rights of which a reasonable person would have known.

28. By reason of the foregoing, any claim for money damages of any kind purported to be alleged in the first amended complaint as against defendant Commissioners in their individual capacities is barred by the doctrine of qualified immunity.

WHEREFORE, the undersigned respectfully requests that judgment be entered dismissing the first amended complaint, and granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 29, 2006

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State of New York
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