

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

.....
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,

-Plaintiffs,

-against-

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

-Defendants.
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**ANSWER TO FIRST
AMENDED
COMPLAINT**

Index No. **04-CV-1129**

The New York State Board of Elections and its Commissioners, Neil W Kelleher, Helena Moses Donohue, and Evelyn J. Aquila (hereinafter "the Board"), by their attorneys, Todd D. Valentine and Patricia L. Murray, for their answer to the verified petition:

1. Admit to the allegations contained in paragraphs numbered 35.
2. Deny the allegations contained in paragraphs numbered 4, 5, 28, 39, 41, 54, 72, 76, 79, 91, 92, 97, 100, 101, 102, 105, 106, 107, 108, 110, 111, 112, 113 and 114.
3. Deny the allegations contained in paragraph 21 of the first amended complaint, except admit that defendants Neil W. Kelleher, Evelyn J. Aquila and Helena Moses Donohue are three of the four Commissioners of the State Board of Elections, and aver 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.
4. Deny knowledge and information sufficient to admit or deny the allegations contained in paragraphs numbered 7, 33, 44, 45, 46, 47, 48, 49, 53, 55, 56, 58, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 75, 90, 93, 95, 96, 98 and 99.

5. Make no response as to paragraphs numbered 22 and 27, as they contain no statement of fact.

6. Denies the allegations contained in paragraphs 36, 73, 74, 77, and 78, 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.

7. That the allegations contained in paragraphs numbered 1, 3, 34, 51, 52, 57, 87 and 103 constitute a characterization of the case to which no response is required, but to the extent that an answer is made, deny knowledge or information sufficient to form a belief in respect thereto.

8. As to the allegations contained in paragraph 6, respectfully refer the Court to the Constitution and laws for an accurate depiction of the contents thereof deny the allegations to the extent that they depart therefrom.

9. As to the allegations contained in paragraphs 2, 24, 25, 26, 32, 38, 40, 43, 83, 84, and, 88 respectfully refer the Court to the New York Election Law for an accurate depiction of the contents thereof, and deny the allegations to the extent that they depart therefrom.

10. Denies the allegations in paragraphs 23, 37, 42, 50, 59, 67, 80, 81, 82, 85, 86, and 89, 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.

11. Deny the allegations set forth in paragraph 20, and respectfully refers the Court to the New York Election Law for a statement of the powers and duties of the New York State Board of Elections.

12. As to paragraph 10, deny the allegations contained in the sixth and seventh sentences and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraph.

13. As to paragraph 11, deny the allegations contained in the fourth, fifth and seventh sentences and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraph.

14. As to paragraphs 12, 14, 15, 17, 18 and 19, deny the allegations contained in the fourth sentence of each and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraphs.

15. As to paragraph 13, deny the allegations contained in the fourth and sixth sentences and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraph.

16. As to paragraph 16, deny the allegations contained in the fifth, sixth and seventh sentences and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraph.

17. As to paragraph 29, admit that the procedure for political parties to nominate candidates for Supreme Court justice is through the judicial nominating conventions, and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraph.

18. As to paragraph 30, admit that delegates to judicial conventions are elected at the fall primary election and that candidates for Supreme Court are nominated by a majority vote of the delegates at the judicial convention, and deny the allegations set forth in the remainder of the paragraph.

19. As to the allegations contained in paragraph 31, respectfully refer the court to the New York Judiciary Law for an accurate depiction of the contents thereof and deny the allegations to the extent that they depart therefrom.

20. As to the allegations contained in paragraph 60 deny the allegations contained in the

last sentence and deny knowledge and information sufficient to admit or deny the allegations contained in the remainder of the paragraph.

21. As to paragraph 94 deny knowledge and information sufficient to admit or deny the allegations regarding the amount of votes Judge Lopez-Torres received for Civil Court, and deny the allegations set forth in the remainder of the paragraph.

FIRST AFFIRMATIVE DEFENSE

22. The complaint fails to state a claim upon which relief can be granted

SECOND AFFIRMATIVE DEFENSE

23. 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.

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

25. 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.

26. 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.

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

THIRD AFFIRMATIVE DEFENSE

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

29. 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.

30. 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.

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

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

FOURTH AFFIRMATIVE DEFENSE

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

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

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

36. 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 AFFIRMATIVE DEFENSE

37. 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.

