

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTHA HAYES,

Plaintiff,

Case No. 1:07-cv-1237

v.

MICHIGAN DEMOCRATIC PARTY,

Hon. Robert J. Jonker

and

THE STATE OF MICHIGAN AND TERRI LYNN LAND,
solely in her official capacity as Secretary of State of Michigan
JOINTLY AND SEVERALLY,

Defendants.

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**ATTACHMENT TO
BRIEF OF MICHIGAN DEMOCRATIC PARTY IN SUPPORT OF MOTION TO
DISMISS AND OPPOSING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION
filed on December 28, 2007
(inadvertently omitted from filing)**

The attached unpublished opinion in *Hernandez v. Thomas*, No. 92-173, 1993 U.S. Dist. LEXIS 21285 (W. D. Mich. 1993), was inadvertently omitted from the Brief of Michigan Democratic Party in Support of Motion to Dismiss And Opposing Plaintiff's Motion for Preliminary Injunction filed on December 28, 2007.

SACHS WALDMAN, P.C.

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Dated: January 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Attachment to Brief of Michigan Democratic Party in Support of Motion to Dismiss And Opposing Plaintiff's Motion for Preliminary Injunction** using the ECF system on this 4th day of January, 2008, which will send notice of this filing to all registered parties via electronic transmission.

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JUSTO HERNANDEZ; ELENA HERRADA; ISABEL PEREZ; ANGELITA GARCIA; RANDY PACHECO; GILBERTO GUEVARRA; RICHARD MARTINEZ; GUADALUPE JIMENEZ; BARBARA JEAN DIAZ; MICHAEL DIAZ; and PRIMITIVO JIMENEZ, Plaintiffs, v. CHRISTOPHER THOMAS, Director of Elections; RICHARD H. AUSTIN, Secretary of State, Department of State, State of Michigan; WILLIE JENKINS, Township Clerk, Buena Vista Township; JOAN NAGEL, Township Clerk, Clyde Township; Defendants, THE MICHIGAN DEMOCRATIC PARTY, Intervening Defendants.

File No. 1:92:CV:173

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

*1993 U.S. Dist. LEXIS 21285***August 19, 1993, Filed**

DISPOSITION: [*1] Intervening defendant Michigan Democratic Party's motion to dismiss count five of the amended and supplemental complaint (dkt. # 62) GRANTED; JUDGMENT GRANTED in favor of intervening defendant Michigan Democratic Party and against plaintiffs as to count V of plaintiffs' first amended complaint. Michigan Democratic Party DISMISSED; plaintiff's motion for partial summary judgment against intervening defendant Michigan Democratic Party (dkt. # 73) DENIED; intervening defendant Michigan Democratic Party's motion to strike evidentiary materials (dkt. # 98) DENIED as moot.

COUNSEL: For JUSTO HERNANDEZ, ELENA HERRADA, ISABEL PEREZ, ANGELITA GARCIA, RANDY PACHECO, GILBERTO GUEVARRA, RICHARD MARTINEZ, GUADALUPE JIMENEZ, BARBARA JEAN DIAZ, MICHAEL DIAZ, PRIMITIVO JIMENEZ, plaintiffs: Dorean M. Koenig, Cooley Law School, Lansing, MI. Tom Downs, Lansing, MI. Neal Bush, Detroit, MI. Paul J. Denenfeld, Legal Director, Detroit, MI. Patricia A. Johnson, E. Lansing, MI. Neil Bradley, American Civil Liberties Union Foundation, Voting Rights Project, S Regional Office, Atlanta, GA.

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For MICHIGAN DEMOCRATIC PARTY aka Michigan Democratic Party State Central Committee, intervenor: Mark Brewer, Theodore Sachs, Sachs, Nunn, Kates, Kadushin, et al, Detroit, MI.

JUDGES: RICHARD A. ENSLEN, U.S. District Judge.

OPINION BY: RICHARD A. ENSLEN

OPINION

OPINION

This case is before the Court on several motions filed by the parties, including: motion of intervening defendant Michigan Democratic Party to dismiss count five of the amended and supplemental complaint; plaintiffs' motion for partial summary [*3] judgment against the defendant Michigan Democratic Party; and, motion of intervening defendant Michigan Democratic Party to strike evidentiary materials. In this Opinion, I will only address the issues

between plaintiffs and the intervening defendant, the Michigan Democratic Party (the "MDP" or "defendant").

Count V of the underlying complaint (the only count involving the MDP) in this case alleges that the MDP deprived plaintiffs of their rights under the Michigan State Election Law, *M.C.L.A. § 168.523 et seq.*, as well as Section 5 of the Voting Rights Act, *42 U.S.C. § 1973c*. This count is brought pursuant to *42 U.S.C. § 1983*.

The events leading up to the filing of this action are well-known by the parties and the Court. Thus, I see no need to recite the facts in this Opinion.

Standard

A motion to dismiss under *Rule 12(b)(6)* tests the sufficiency of the pleading. *Davis H. Elliot Co., Inc. v. Caribbean Utils. Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975). Technically, of course, the 12(b)(6) motion does not attack the merits of the case. It merely challenges the pleader's failure to state a claim properly. [*4] 5 C. Wright, A. Miller & H. Kane, *Federal Practice and Procedure* § 1364, at 340 (Supp. 1990). In deciding a 12(b)(6) motion, the court must determine whether plaintiffs' complaint sets forth sufficient allegations to establish a claim for relief. The court must accept all allegations in the complaint at "face value" and construe them in the light most favorable to plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 829 (1984); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1034-35 (6th Cir. 1979).

The complaint must in essence set forth enough information to outline the elements of a claim or to permit inferences to be drawn that these elements exist. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969); *German v. Killeen*, 495 F. Supp. 822, 827 (E.D. Mich. 1980). The court cannot dismiss plaintiffs' complaint unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). [*5] Conclusory allegations are not acceptable, however, where no facts are alleged to support the conclusion or where the allegations are contradicted by the facts themselves. *Vermilion Foam Prods. Co. v. Gen. Elec. Co.*, 386 F. Supp. 255 (E.D. Mich. 1974).

Discussion

In its motion, MDP makes a number of arguments as to why count V should be dismissed. Because this Court finds that MDP was not "acting under color of law" in selecting its convention delegates and is dispositive of this action (as to MDP), I need not address the other arguments presented in MDP's brief. Moreover, I note that there is

some disagreement between the parties as to whether this motion needs to be decided by a three judge panel pursuant to *28 U.S.C. § 2284*. Because I find that plaintiffs' claim is without merit, I may dismiss this action under *Rule 12(b)(6)* without a three judge panel. See, e.g., *Webber v. White*, 422 F. Supp. 416, 424-25 (N.D. Texas 1976) ("Under new § 2284(b)(3), Congress intended a single judge to have the power to dismiss under *Fed. R. Civ. Proc. 12*); accord *Miller v. Daniels*, 509 F. Supp. 400, 405 (S.D.N.Y. 1981) [*6] ("Courts confronted with section 5 claims (of the Voting Rights Act) have consistently held that a single judge may dismiss section 5 claims that are wholly insubstantial and completely without merit (numerous citations omitted)").

As the parties are aware, in order to be subject to suit under § 1983, the defendant's conduct must be "fairly attributable" to the state, *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982); *Simescu v. Emmet County Dep't of Social Servs.*, 942 F.2d 372, 374 (6th Cir. 1991); that is, the challenged action must have been taken "under color of state law." See generally *NCAA v. Tarkanian*, 488 U.S. 179, 191, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988); *Rendell-Baker*, 457 U.S. at 838; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-39, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).

Clearly, the Michigan Democratic Party is a private organization, not formally affiliated with the state. This fact alone does not, however, end the inquiry. When a private entity is alleged to be a state actor or acting under "color of law," the ultimate question is "whether [*7] there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). In answering this question, courts have found a number of factors relevant, including the extent of state regulation of, and involvement in, the private action, whether the state has sanctioned, ordered or encouraged the action, whether the private action is of significant public interest or entails a traditionally public function, and whether the state benefits from the private action. See generally *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961).

The Second Circuit in *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1973), has pulled these factors together in a coherent test:

- (1) the degree to which the "private" organization is dependent on governmental aid;
- (2) the extent and intrusiveness of [*8] the governmental regulatory scheme;
- (3) whether that scheme connotes government

approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Id. at 629.

In this case, plaintiffs allege the following in their complaint with respect to the "color of state law" issue:

74. The Michigan Democratic Party followed state law pertaining to the selection of delegates because it was required to follow state law by *M.C.L.A. 168.620a.*, which mandates that State law, which requires party affiliation and recordation, be followed if this is required by party rules.

75. The Michigan Democratic Party has such a state or national party affiliation rule.

76. Further, the Michigan Democratic Party accepted the Democratic public primary votes cast in the Michigan Presidential Primary throughout Michigan except for the Democratic votes cast in Clyde and Buena Vista Townships.

As defendant [*9] points out, plaintiffs' argument under this theory is flawed in many respects. First, a statute cannot by *ipse dixit* convert the private conduct of the MDP into "state action." If that were so, the state could subject private conduct to constitutional standards simply by declaring private conduct to be "public."¹

¹ Cf. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980) (a "State, by *ipse dixit*, may not transform private property into public property without compensation ...").

Additionally, the statute upon which plaintiffs rely, *M.C.L. § 168.620a*, is nearly identical to a prior Michigan election law that was declared unconstitutional by this Court (Western District of Michigan, Judge Hillman) and upheld by the Sixth Circuit. *Ferency v. Austin (Ferency I)*, 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981). In *Ferency I*, the Sixth Circuit held:

We conclude [*10] that, in the light of the decisions of the Supreme Court in *Cousins v. Wigoda*, 419 U.S. 477, 95 S. Ct. 541, 42 L. Ed. 2d 595 (1975) and in *LaFollette*, *supra*, the Michigan statute could not be enforced so as to control the method of selection of Michigan delegates to the Democratic National Convention.

Ferency I, 666 F.2d at 1025.

Although I do not wish to rule on the constitutionality of § 168.620a in this Opinion, I seriously question this statute's validity in light of *Ferency I*.² If § 168.620a is in fact unconstitutional, then it certainly cannot be used as the premise for arguing that the MDP's private conduct is somehow "state action." Nonetheless, I need not reach this issue because I find that plaintiffs' argument is flawed on its face, as I discussed above.

2 Nor do I wish to comment on the constitutionality of *M.C.L. § 168.619*, another statute upon which plaintiffs rely that raises similar problems.

As defendant points out, the gravamen of [*11] this Court's inquiry in determining whether a political party is a state actor for purposes of *section 1983* is to examine the conduct of the party. *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990). In *Banchy*, the Sixth Circuit read the "white primary cases"³ narrowly, limiting their holding to cases in which the political primary process completely dominates the election process.

The primary election cases [white primary cases] do not hold that a political party is part of the state, or that any action by a political party other than conducting an election is state action.... The primary election cases merely hold that conducting an election is a governmental function and constitutes state action, no matter who actually conducts the election.

Id. at 1196.

³ See *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953); and *Smith v. Allwright*, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757 (1944).

[*12] Thus, this Court must examine the conduct of the MDP in order to determine if there is "state action."

In light of *Banchy*, it seems to me that anything short

of actually conducting an election does not rise to the level of "state action." Here, clearly, the MDP did not conduct the Michigan Presidential primary, or any other election. See Moffit affidavit P 3. Instead, the MDP selected its delegates by internal caucuses as detailed in Section I.B. of the MDP's Delegate Selection Plan (copy attached to original complaint). This plan states that the Party solely controls delegate selection which selection is done by Party caucuses:

B. Number of delegates and alternate delegates to be elected to Democratic National Convention

1. 86 district-level delegates and 14 alternates will be elected by presidential caucuses of enrolled Democrats at congressional district conventions on May 9, 1992.

2. 17 pledged party leader and elected official delegates will be elected by presidential caucuses of the Democratic State Central Committee on May 16, 1992.

3. 28 at-large delegates and 8 at-large alternates will be elected by presidential caucuses of the Democratic [*13] State Central Committee on May 16, 1992.

4. 2 add-on unpledged delegates will be elected by the Democratic State Central Committee on May 16, 1992.

A number of pre-Banchy courts have held that a political party does not engage in "state action" when selecting its delegates by internal caucuses. See, e.g., *Ferency I*, 493 F. Supp. at 699; see also *Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1045-46 (E.D. Mich. 1984). In other words, in post-Banchy terminology, using this system to select delegates does not amount to "conducting" an election. Undoubtedly, it is solely for the private determination of a political party whether and how voters will participate in convention delegate selection. As Judge Hillman wrote in *Ferency I*:

The Constitution does not require that voters be afforded an opportunity to participate at either final or preliminary stages in the nomination process for presidential candidates. Whether the voters will participate in the delegate selection process, and, if so, at what stage, and

whether their participation will be translated directly into delegate representation at the national convention are [*14] matters for the political parties themselves to determine, and, if the parties permit it, for the state.

Ferency I, 493 F. Supp. at 699; see also *Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1045-46 (E.D. Mich. 1984) (same).

Thus, the private determination of the MDP whether and how to use, or not to use, the Presidential primary results as one factor in delegate selection does not amount to "conducting" an election. Therefore, under *Banchy*, a political party does not engage in "state action" in selecting its delegates by internal caucuses.

Accordingly, for all the reasons stated above, I find that there is no "state action" by the MDP in this case. As such, defendant's motion to dismiss count V under *Federal Rule of Civil Procedure 12(b)(6)* is granted.

RICHARD A. ENSLEN

U.S. District Judge

JUDGMENT AS TO INTERVENING DEFENDANTS

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that the motion of intervening defendant Michigan Democratic Party to dismiss count five of the amended and supplemental complaint, filed August 18, 1992 (dkt. # 62), is [*15] **GRANTED**;

IT IS FURTHER ORDERED that **JUDGMENT is GRANTED** in favor of intervening defendant Michigan Democratic Party and against plaintiffs as to count V of plaintiffs' first amended complaint. As such, intervening defendant Michigan Democratic Party is **DISMISSED** from this case;

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment against intervening defendant Michigan Democratic Party, filed September 14, 1992 (dkt. # 73), is **DENIED**;

IT IS FURTHER ORDERED that the motion of intervening defendant Michigan Democratic Party to strike evidentiary materials, filed November 23, 1992 (dkt. # 98), is **DENIED as moot**.

RICHARD A. ENSLEN

U.S. District Judge