UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS and KIM COLHOFF, Plaintiffs, vs. CHRIS NELSON, in his official capacity as Secretary of State of South Dakota and as a member of the State Board of Elections; MATT McCAULLEY, CINDY SCHULTZ, CHRISTOPHER W. MADSEN, RICHARD CASEY, KAREN M. LAYHER, and LINDA LEA M. VIKEN, in their official capacities as members of the State Board of Elections; and SUE GANJE, in her official capacity as Auditor for Shannon County, Defendants.	)	Civil Action No. 09-5019

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE STATE DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, by and through counsel, file this Response in Opposition to Defendants Chris Nelson, Matt McCaulley, Cindy Schultz, Christopher W. Madsen, Richard Casey, Karen M. Layher, and Linda Lea M. Viken's (hereinafter "the State Defendants") motion to dismiss the case against them under Fed. R. Civ. P. 12(b)(6) for failure to state a claim or, in the alternative, a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Defendants also ask this Court to stay discovery pending a ruling on their motions.

Plaintiffs maintain that the complaint sufficiently alleges the State Defendants improperly removed their names from the statewide voter registration list in violation of state and federal law, and that the defendants have adopted a voting practice and policy

which removes the names of eligible voters based on their felony convictions regardless of the sentence imposed in contravention of Sections 2 and 5 of the Voting Rights Act of 1965, and the National Voter Registration Act and the Help America Vote Act. Furthermore, the State Defendants must remain a party to the lawsuit in order to effectuate the relief Plaintiffs seek. Therefore, Plaintiffs respectfully request that this Court deny the State Defendants' motion to dismiss the complaint against them and their motion for judgment on the pleadings, and deny their request to stay discovery.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs filed this civil action on February 18, 2009, challenging the defendants' removal of their names from the statewide and county voter registration rolls based on their felony convictions even though they were sentenced only to probation and South Dakota law allows probationers to vote. [Docket Entry (D.E.) 1]. See S.D.C.L. § 23A-27-35 (suspending the right to vote only during a term of imprisonment in the state penitentiary). They maintain that they were denied an opportunity to cast provisional ballots despite federal and state laws which clearly would have allowed them to do so if there was any question regarding their eligibility to vote. Id.; Help America Vote Act (HAVA), 42 U.S.C. § 15482(a)(1) (allowing persons whose names do not appear on the list of eligible voters to cast a provisional ballot, and requiring poll officials to advise persons of that right); S.D.C.L. § 12-18-39 (allowing persons whose names do not appear on the list of eligible voters to cast a provisional ballot).

Plaintiffs also allege that the denial of their right to vote violated the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Constitution of South Dakota. S.D. CONST. art. VI. §§ 2, 19; S.D.

CONST. art. VII, § 1. They maintain that defendants failed to implement an accurate and current statewide voter registration list as required by HAVA, 42 U.S.C. § 15483(a)(1)(A) & (2)(B)(ii), and the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg-6. [D.E. 1]. Plaintiffs further contend that the defendants applied a standard, practice, or procedure to them different from those applied to other individuals who have been found qualified to vote, in violation of 42 U.S.C. § 1971.

Plaintiffs also assert that the defendants' removal of their names, and the names of others with felony convictions who lawfully are entitled to vote, constitutes a change in the State's voting practices and procedures and, therefore, the defendants were required to seek preclearance from the Department of Justice or the U.S. District Court for the District of Columbia under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), prior to implementing such a change. Id. Because the voting changes affect Shannon and Todd Counties, which are covered by Section 5, the state is required to submit the changes for federal review. See Bone Shirt v. Hazeltine, 200 F.Supp.2d 1150 (D.S.D. 2002) (three-judge court). Plaintiffs further allege the State Defendants' failure to properly enforce South Dakota's felon disfranchisement law has a disproportionate and adverse impact on Native Americans in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. [D.E. 1].

Plaintiffs request an injunction prohibiting all of the defendants from continuing these unlawful voting practices and procedures until they have complied with Section 5, and an order instructing the State Defendants to take affirmative steps to educate the public across the state regarding the voting rights of people with felony convictions in South Dakota. Id. They also seek compensatory and nominal monetary damages. Id.

In addition to the complaint, Plaintiffs filed a motion for a temporary restraining order/preliminary injunction to allow them to vote in the June 9, 2009 elections held in Shannon County. [D.E. 24]. Prior to this Court ruling on that motion, the defendants placed Plaintiffs' names back on the voter registration rolls. Consequently, Plaintiffs moved to withdraw their motion without prejudice, which this Court granted. [D.E. 46, 47]. On April 13, 2009, the State Defendants filed a motion to dismiss Plaintiffs' claims for monetary damages on the grounds that they were not sued in their individual capacities and this Court lacks the jurisdiction to award monetary damages. [D.E. 38].

On May 4, 2009, Plaintiffs filed a motion to amend the complaint to add La Fawn Conroy, a Shannon County poll worker, as a defendant, and to sue all of the defendants individually and in their official capacities. [D.E. 49]. The proposed amended complaint also contains additional allegations regarding the denial of Plaintiff Janis' right to cast a regular ballot and provisional ballot on November 4, 2008 by poll workers, and cites more provisions of HAVA and the NVRA which Defendants violated. Id. Plaintiffs also filed a response in opposition to the State Defendants' first motion to dismiss, citing their proposed amended complaint. [D.E. 51]. The State Defendants, but not Defendant Sue Ganje (the Shannon County defendant), filed a response in opposition to Plaintiffs' motion to amend the complaint. [D.E. 52]. This Court has not ruled on the State Defendants' first motion to dismiss or Plaintiffs' motion to amend the complaint.

On June 12, 2009, the State Defendants filed their second motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim or, in the alternative, pursuant to Fed. R. Civ. P 12(c) for a judgment on the pleadings in their favor. [D.E. 55]. They also request that this Court stay discovery pending the resolution of their motion. Id. After

the State Defendants filed their second motion to dismiss and motion for judgment on the pleadings and requested a stay of discovery, this Court issued a scheduling order which requires discovery to end on November 2, 2009. [D.E. 57].

II. APPLICABLE LEGAL STANDARDS

When ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim, a court must accept all of the factual allegations in the complaint as true and review the complaint in the light most favorable to the plaintiff. Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008). The federal rules do not require plaintiffs to provide all of the specific facts which support their claim, but the complaint must contain sufficient factual information to support the grounds upon which their claims rest. Id. (citing Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (a plaintiff's allegations must "raise a right to relief above a speculative level")). See also Drobnak v. Anderson Corp., 561 F.3d 778, 783 (8th Cir. 2009) ("[Fed. R. Civ. P. 12(b)(6)] does not require great detail, but the facts alleged 'must be enough to raise a right to relief above the speculative level' and must 'state a claim to relief that is plausible on its face.'" (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)).

Courts review a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings under the same standard used for analyzing a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Waldron v. Boeing Co., 388 F.3d 591, 593 (8th Cir. 2004). When ruling on a Fed. R. Civ. P. 12(c) motion, the court must assume that the complaint's factual allegations are true and should construe all inferences from them in the non-moving party's favor. Id. The court must not look at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S.

232, 236 (1974). A court should only grant a motion for judgment on the pleadings when there is no material fact in dispute and the moving party is entitled to judgment as a matter of law. Wishnatsky v. Rovner, 433 F.3d 608, 610 (8th Cir. 2006); Syverson v. FirePond, Inc., 383 F.3d 745, 749 (8th Cir. 2004).

Assuming all of the allegations in Plaintiffs' complaint are true, as this Court must do, Plaintiffs have stated federal and state law claims upon which relief may be granted against the State Defendants.

III. ARGUMENT AND CITATIONS OF AUTHORITY

A. Plaintiffs Have Alleged Sufficient Claims Under South Dakota and Federal Law Against The State Defendants For Which This Court May Grant Relief.

The State Defendants, heavily relying upon Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), argue that Plaintiffs' legal claims "are no more than conclusions unsupported by factual allegations" and that Plaintiffs have not alleged any wrongdoing on their part. State Defs.' Br. at 2-3. They also contend that Plaintiffs' claims fail because it is the counties which bear the sole responsibility for enforcing the state's felon disfranchisement law. Id. at 3. They further assert they cannot be held liable under the theory of respondeat superior because they have no supervisory authority over the counties when it comes to determining who is eligible to vote. Id. at 4.

The factual allegations and law cited in Plaintiffs' complaint clearly demonstrate that it is the State Defendants' responsibility to maintain accurate statewide voter registration lists and to enforce the state's felon disfranchisement law in a manner which does not result in the unlawful removal of qualified electors. The State Defendants play the initial and primary role in determining who is eligible to vote under the state's felon

disfranchisement law, and they are not only proper defendants in this lawsuit, but are necessary and indispensable parties for purposes of enforcing any relief this Court awards Plaintiffs. Therefore, this Court should deny the State Defendants' motion to dismiss and motion for judgment on the pleadings.

1. Plaintiffs have satisfied the pleading requirements set forth in Fed. R. Civ. P. 8 and Bell Atlantic Corp. v. Twombly.

Rule 8(a) of the Federal Rules of Civil Procedure provides that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." In Bell Atlantic Corporation v. Twombly, the Court held that the factual allegations in a complaint need not be detailed, but must instead be sufficient enough to establish that, if true, the plaintiff would be entitled to relief. 550 U.S. at 555-56. Twombly involved a class action lawsuit against local telephone carriers for alleged violations of anti-trust laws, namely the Sherman Act (15 U.S.C. § 1). Id. at 550-51. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6), ruling that the misconduct alleged in the complaint did not constitute a violation of the Act. The Supreme Court affirmed the dismissal and, in doing so, disavowed the once long-standing principle that dismissal only was warranted if the plaintiff could prove "no set of facts" in support of his claim which would entitle him to relief. Id. at 561-63.

The Twombly decision created some doubt among the circuits as to the appropriate pleading requirements. See Commercial Money Ctr., Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 337 n.4 (6th Cir. 2007) ("We have noted some uncertainty concerning the scope of Bell Atlantic Corp. v. Twombly, . . . in which the Supreme Court 'retired' the 'no set of facts' formulation of the Rule 12(b)(6) standard . . . ."). Accord Tooley v. Napolitano, 556 F.3d 836, 839 (D.C. Cir. 2009); Boykin v. Key Corp., 521

F.3d 202, 213 (2nd Cir. 2008); Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007). The Eighth Circuit, however, has interpreted Twombly as requiring a plaintiff to "assert facts that affirmatively and plausibly suggest that the pleader has the right he claims . . . rather than facts that are merely consistent with such a right." Gregory v. Dillard's, Inc., 565 F.3d 464, 473 (8th Cir. 2009) (quoting Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir. 2007)).

In Ashcroft v. Iqbal, the Court held that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S.Ct. at 1949 (involving dismissal of suit by Pakistani Muslim detained after September 11, 2001, attacks who sued government officials for alleged constitutional violations related to his detention). The Court further reasoned that determining whether a complaint satisfies this requirement is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950. The rulings in Twombly and Iqbal have not changed the federal rules' requirement that a complaint provide a defendant with fair notice as to what the claim is and the legal and factual grounds upon which the claim rests. In the instant case, Plaintiffs clearly have satisfied this standard.

Plaintiffs' complaint alleges that it is Defendant Nelson's responsibility to inform the counties of who is ineligible to vote based on a felony conviction, and that the members of the State Board of Elections are responsible for promulgating rules to assist the counties in determining who is qualified to vote and maintaining voter registration files in compliance with HAVA and the NVRA. [D.E. 1 at ¶¶ 7-8]. Plaintiffs allege that their names improperly were removed from the statewide voter registration list, and that

the unlawful manner in which the State Defendants have been enforcing the state's felon disfranchisement law was not precleared in accordance with Section 5 of the Voting Rights Act. Furthermore, they contend that, given the disproportionate number of Native Americans in South Dakota's criminal justice system, the State Defendants' actions result in a violation of Section 2 of the Voting Rights Act. Id. at ¶¶ 26-27, 54-55. Because the counties rely upon the information the State Defendants provide as to who has been convicted of a felony and is ineligible to vote, the State Defendants are jointly or severally liable for acting under color of state law and failing to implement and enforce the state's felon disfranchisement law. Therefore, Plaintiffs properly have alleged wrongdoing on the part of the State Defendants to overcome their Fed. R. Civ. P. 12(b)(6) motion to dismiss.

2. The State Defendants are indispensable parties to this lawsuit for purposes of enforcing any declaratory and/or injunctive relief this Court may award Plaintiffs.

The State Defendants' participation in this lawsuit also is necessary in order to accord the full relief Plaintiffs seek in the complaint. Fed. R. Civ. P. 19 provides that "a person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: in that person's absence, the court cannot accord complete relief among existing parties." (emphasis added). In determining whether the State Defendants are a real party in the case, this Court must examine the effect of any judgment entered in Plaintiffs' favor. U.S. ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932, 939 (8th Cir. 2001); Chicago, R.I. & P.R. Co. v. Long, 181 F.2d 295, 298 (8th Cir. 1950). The State Defendants would be improper

parties to the suit only if any potential judgment would not require any action on their part. Edelman v. Jordan, 415 U.S. 651, 668 (1974).

In addition, a party may be joined under Fed. R. Civ. P. 20(a)(2) as a defendant in one action if "any right to relief is asserted against them jointly, severely, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and . . . any question of law or fact common to all defendants will arise in the action." See also United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) ("joinder of claims, parties and remedies is strongly encouraged."). Accord Mosley v. General Motors Corp., 497 F.2d 1330, 1332-33 (8th Cir. 1974). Plaintiffs allege a right to relief relating to or arising out of the same transaction or occurrence, i.e., the unlawful removal of their names from the state and county voter registration rolls. The State Defendants' practice and policies, or lack thereof, clearly meet the "transaction or occurrence" requirement of Rule 20(a). See, e.g., Alexander v. Fulton County, Georgia, 207 F.3d 1303, 1324 (11th Cir. 2001) (a "pattern or practice" satisfies the transaction or occurrence requirement of the rule), overruled on other grounds by Manders v. Lee, 338 F.3d 1304, 1328 n.52 (11th Cir. 2003). Second, some questions of law or fact common to all of the parties will necessarily arise in this action, i.e., whether people with felony convictions who are not sentenced to a penitentiary retain the right to vote. Indeed, the questions of law and fact in this case will be essentially identical as to all of the defendants. Therefore, joinder of the State Defendants is consistent with Rule 20 and "the broadest possible scope of action" interpretation of the rule required by United Mine Workers of America v. Gibbs, 383 U.S. at 724.

The federal rules clearly contemplate the inconsistency which would arise if, in the instant case, Plaintiffs only sued Shannon County when, as a practical matter, the State Defendants are the only ones who can implement most of the relief Plaintiffs seek. Plaintiffs allege they were improperly denied the right to vote and that the State Defendants have failed to implement adequate procedures to ensure that Plaintiffs and similarly situated eligible voters are not removed from the statewide voter registration lists. [D.E. 1 at ¶¶ 1, 43]. As Defendant Nelson acknowledged in the affidavit he submitted to this Court in opposition to Plaintiffs' motion for a temporary restraining order/preliminary injunction: (a) the secretary of state is the chief state election official (S.D.C.L. § 12-4-33), and has the duty of establishing a computerized statewide voter registration file (S.C.D.L. § 12-4-37); (b) the statewide voter registration file maintained by the state defendants is the official file for federal elections (S.D.C.L. § 12-4-38) ("for federal elections the statewide file shall be the official voter registration file") (c) Defendant Nelson, not the counties, receives notices from the Department of Justice and other states regarding who has been convicted of federal and/or out-of-state crimes (42 U.S.C. §§ 1973gg-6(g)(1), (5)); (d) Defendant Nelson is responsible for informing the counties of who in their county has been convicted of a felony (42 U.S.C. § 1973gg-6(g)(5)); and (e) the State Board of Elections is responsible for promulgating rules regarding the proper maintenance of countywide voter registration lists (S.D.C.L. §§ 12-4-4.8 to -35). [D.E. 36 at ¶ 3, 17, 33-37].

The State Defendants have characterized their role in maintaining accurate voter registration lists as passive, thus leaving it up to the sixty-six (66) individual counties to enforce the state's felon disfranchisement law without any state oversight as to the

accuracy of the counties' actions. As Defendant Nelson states in his affidavit: "Your affiant does not review the federal felony notice for any other information contained in the notice." [D.E. 36 at ¶ 37]. Yet, the State Defendants admit that the statewide voter registration list is the official list for federal elections, and that they, not the counties, ultimately are responsible for ensuring the accuracy of that list. Thus, by their own admission, the State Defendants have violated Plaintiffs' right to equal protection and due process under the law, as well as HAVA and the NVRA, by not taking affirmative steps to ensure the correctness of the statewide list, and by failing to provide the counties with proper guidance for enforcing the state's felon disfranchisement law so that the county and statewide voter registration lists are accurate.

The State Defendants' own admissions further show that Plaintiffs' allegations regarding election problems around the state rise above the level of mere speculation and render their claims more than just plausible. Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 129 S.Ct. at 1949. Plaintiffs always have maintained that the deletion of their names from the state and county voter registration lists and the denial of their right to vote based on their felony convictions are indicative of a pattern and practice in the state of South Dakota whereby election officials automatically remove from voter registration rolls the names of individuals convicted of felonies regardless of the criminal sentence imposed. See Reinholdson v. Minnesota, 2002 WL 31026580 *6 (D. Minn. Sept. 9, 2002) (ruling that a state defendant is a proper party to an action which involves systemic violations of a statute), modified and vacated on other grounds 346 F.3d 847 (8th Cir. 2003). The problems Plaintiffs seek to address in this lawsuit are systemic and the State Defendants are best suited to remedy those problems.

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694 (1978), which involved a claim under the doctrine of respondeat superior, the Court made it clear that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [42 U.S.C. § 1983]." The State Defendants bear significant responsibility for how the state's felon disfranchisement law is enforced on the local level and, as Plaintiffs allege and the State Defendants admit, they have adopted a "hands off" approach when it comes to enforcing the law. This approach, at least in part, is the reason why Plaintiffs improperly were removed from the statewide voter registration list. Because of the central role the State Defendants play in ensuring the accuracy of statewide and county voter registration lists, they are proper parties under Section 1983.

Also, the State Defendants are both appropriate and necessary parties for plaintiffs to receive the relief they seek for the Section 5 violation. As the court held in Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1156 (D.S.D. 2002), "[u]nder the plain meaning of the Voting Rights Act, the State of South Dakota is an entity that must secure preclearance from the Attorney General or bring a declaratory judgment action." In reaching this conclusion, the court noted that Section 5 used the language "State or political subdivision," instead of "covered county." Id. at 1155-56. The court also cited with approval the ruling in United Jewish Org. of Williamsburg, Inc. v. Carey, 430 U.S. 144, 148-49 (1977), that "it became necessary for New York [State] to secure the approval of the Attorney General or of the United States District Court for the District of Columbia for its 1972 reapportionment statute insofar as that statute concerned [the

covered] Counties." The court in Bone Shirt also noted that South Dakota has taken the position that it is responsible for submitting voting changes for preclearance that apply to covered counties, 1977 S.D. Op. Atty. Gen. 175, 1977 WL 36011, and that the opinion has not been rescinded or withdrawn. It follows from the plain meaning of Section 5, the Supreme Court's interpretation of the statute, the interpretation of the South Dakota Attorney General, and the decision in Bone Shirt, that the Voting Rights Act requires the state to submit voting changes that affect its two covered counties. Under the circumstances, the state defendants are both necessary parties under Rule 19(a)(1)(A), and permissive parties under Rule 20(a)(2)(A), for Plaintiffs to be accorded relief on their Section 5 claim.

In addition to having their names placed back on the state and county voter registration lists, Plaintiffs seek: (a) a declaratory judgment that the State Defendants violated their rights under state and federal law; (b) an injunction prohibiting the State Defendants from engaging in the same unlawful conduct around the state, not just in Shannon County; and (c) the preparation and distribution across the state of public service announcements and education materials regarding the voting rights of people with felony convictions. [D.E. 1, Prayer for Relief]. Given the central role the State Defendants play in determining who is eligible to vote, they are a necessary party in order to afford Plaintiffs complete relief. If they were absent from the litigation, the State Defendants could claim they are not bound by, and refuse to implement, any remedial decree of this Court. Accordingly, if this Court grants Plaintiffs declaratory and/or injunctive relief, it would not be complete unless it included the State Defendants within its purview.

B. This Court Should Not Toll Discovery Pending A Resolution of the State Defendants' Motion to Dismiss or Motion for Judgment on the Pleadings.

The State Defendants also ask this Court to stay any discovery against them pending a ruling on their motion to dismiss or motion for judgment on the pleadings. State Defs.' Br. at 5. Specifically, they seek to avoid producing any discovery related to Plaintiffs' claim under Section 2 of the Voting Rights Act, arguing that any requests for racial statistics regarding South Dakota's criminal justice system would be "far reaching, time consuming and enormously expensive." Id. at 6.

Plaintiffs, who are Native Americans, allege that Native Americans are disproportionately represented in South Dakota's criminal justice system and represent a disproportionate number of those who are sentenced to probation. [D.E. 1, at ¶ 26]. They also allege that the State Defendants have adopted a practice and policy which unlawfully removes eligible voters who have felony convictions from the statewide voter registration list, and that this practice results in Native Americans being disproportionately and adversely affected by such actions. Id. at ¶ 27. As stated in Section A above, the State Defendants acknowledge that they have not taken any steps to ensure that only those properly subject to the state's felon disfranchisement law are removed from the statewide voter registration list. Based on this admission, it is more likely than not that individuals in other counties around the state also have unlawfully been removed from the state list. The State Defendants admit in their Answer to the Complaint that Native Americans are represented in the criminal justice system, but a question of fact remains as to whether Native Americans are overrepresented and, therefore, are disproportionately and adversely impacted by the State Defendants'

actions. Thus, assuming Plaintiffs' factual allegations are true, they have stated a claim under Section 2 of the Voting Rights Act against the State Defendants, Schaaf v. Residential Funding Corp., 517 F.3d at 549, and the outstanding question of material fact is sufficient to overcome the State Defendants' motion for judgment on the pleadings. Wishnatsky v. Rovner, 433 F.3d at 610; Syverson v. FirePond, Inc., 383 F.3d at 749.

In their motion to dismiss or motion for judgment on the pleadings, the State Defendants seek dismissal of the complaint against them, but do not assert that Plaintiffs Section 2 claim should be dismissed in its entirety even if they were to remain a party to the suit. Even assuming that this Court grants their motion, Plaintiffs' Section 2 claim will remain a part of the case and it is the State Defendants, not Shannon County, who possess the information Plaintiffs seek to support that claim. Therefore, even if the State Defendants are not a party to the lawsuit, they can still be required to produce the evidence Plaintiffs seek through a subpoena. Fed. R. Civ. P. 45. The State Defendants, in seeking to stay discovery against them, are attempting to delay Plaintiffs' access to information to which they lawfully are entitled.

It is also noteworthy that after the State Defendants filed their motion, this Court issued a scheduling order which requires the parties to complete all discovery by November 2, 2009. Plaintiffs recognize this Court carries a heavy caseload and that a ruling on the State Defendants' motion may take a substantial amount of time. However, Plaintiffs already have begun incurring expenses in the preparation of their discovery requests and intend to serve them on the State Defendants within the next week. Plaintiffs, not the State Defendants, will be the ones unduly prejudiced by engaging in piecemeal discovery if not allowed to seek evidence in support of their Section 2 claim

now. See, e.g., Lewallen v. Green Tree Serv., LLC, 487 F.3d 1085, 1093 (8th Cir. 2007) (denying defendant's motion to dismiss the complaint, and recognizing that plaintiff experienced discovery-related prejudice when she prepared discovery requests, but faced the possibility of not being able to serve those requests). Defendants have not presented this Court with any legitimate or reasonable basis for granting their motion to stay discovery and, therefore, this Court should deny their request.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs ask that this Court deny the State Defendants' motion to dismiss for failure to state a claim and their motion for judgment on the pleadings; and that this Court also deny their request to stay discovery pending the resolution of their motion.

DATED this 2nd day of July, 2009.

Respectfully submitted,

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