UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF, Plaintiffs, v. CHRIS NELSON, IN HIS INDIVIDUAL AND 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. MADEN, RICHARD CASEY, KAREN M. LAYHER, AND LINDA LEA M. VIKEN, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS MEMBERS OF THE STATE BOARD OF ELECTIONS; AND SUE GANJE, IN HER OFFICIAL AND INDIVIDUAL CAPACITY AS AUDITOR FOR SHANNON COUNTY; AND LAFAWN CONROY, IN HER INDIFICUAL AND OFFICIAL CAPACITY AS A POLL WORKER FOR SHANNON COUNTY, Defendants.	)	Case No. 09-5019 MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PLAINTIFFS' MOTION TO AMEND COMPLAINT

Defendants, Sue Ganje and LaFawn Conroy, by and through their counsel of record Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, hereby submit their Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Plaintiffs' Motion to Amend Complaint.

Plaintiffs must establish all requirements of Fed. R. Civ. P. 23 in order to maintain a class action.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Plaintiffs cannot meet all prerequisites to maintain a class action.

A. (a) Prerequisites for Plaintiff Class

(1) The Plaintiff class is not so numerous that joinder of all members is impracticable

Plaintiffs seek to sue on behalf of South Dakota felons wrongfully removed from the voter registration list. Plaintiffs wrongfully describe this class of individuals as all convicted felons who were sentenced only to probation, as if all convicted felons sentenced only to probation in South Dakota are removed from the voter registration list. Plaintiffs do not cite any proof whatsoever that convicted South Dakota felons sentenced to probation only have been or are being removed from voter registration lists in any county other than Shannon County.

Plaintiffs' further contend that "class membership is constantly growing as new individuals are convicted of felonies and sentenced to probation." Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, Doc. 127 p. 4. Plaintiffs cite no proof whatsoever that felons sentenced to only probation are being wrongfully removed from voter registration lists in any county.

In Plaintiffs' first footnote, they cite a website which indicates that in 2007, 972 South Dakotans were on probation. This website does *not* indicate that those individuals were sentenced to only probation. Therefore, this website does not indicate people convicted of a felony who necessarily retain the right to vote (because many or all of these individuals may have been sentenced to penitentiary imprisonment, disqualifying them from voting). Accordingly, such statistics are altogether irrelevant. Plaintiffs wrongfully state on page 4 of their brief that these 972 probationers were "sentenced to probation." The website does not state this. Moreover, whether a felon is sentenced to probation is irrelevant. Whether a felon is

sentenced to probation *only*, and not to penitentiary time, is the relevant inquiry in determining whether a felon retains his right to vote. SDCL § 12-4-18.

In footnote 2 of Plaintiffs' brief, page 4, Plaintiffs again cite irrelevant information. Plaintiffs state that there are about 1,100 adults currently under probation supervision in South Dakota. Of course, this statistic says nothing as to how many of those individuals, if any, were sentenced *only* to probation (and therefore retained there right to vote under SDCL § 12-4-18). Therefore, Plaintiffs' numbers asserted in their brief are greatly exaggerated when used to describe the plaintiff class.

The plaintiff classes in this case are only those convicted felons who retain the right to vote under South Dakota law. Accordingly, the plaintiff class may only consist of convicted felons who retain the right to vote – those felons which did not receive penitentiary imprisonment. Plaintiffs give no support or estimate whatsoever indicating even a ball park figure for the number of convicted South Dakota felons who received only probation as a sentence.

Next, Plaintiffs cite their Exhibit A for the proposition that there were "1,361 people sentenced to probation in South Dakota between 2002 and January 28, 2010." Doc. 127 p.4. Plaintiffs neglect to point out to the Court that these statistics also include the many individuals sentenced to suspended impositions of sentence. There is no breakdown between those given suspended impositions of sentence and those sentenced to probation in Exhibit A.

Individuals given suspended impositions of sentence are not convicted of a felony, and therefore are not removed from the voter registration list. Plaintiffs provide no evidence whatsoever alleging that South Dakotans given suspended impositions of sentence have been removed from voter registration lists. Plaintiffs provide no factual support or allegation as to

how many of the 1,361 people given suspended impositions of sentence *or* probation were sentenced to only probation. Therefore, Plaintiffs have provided no helpful information to the Court indicating how many class plaintiffs may exist. Without such proof, it is equally as likely that there are no other class plaintiffs in South Dakota.

In addition to being a convicted felon sentenced only to probation, to be a member of the plaintiff class the individual must also have been registered to vote. A potential plaintiff may not be wrongfully removed from the voter registration list unless registered in the first place. Plaintiffs give no indication how many people sentenced only to probation were registered voters.

Moreover, such proposed plaintiff class members must also have been wrongfully removed from the voter registration list. Plaintiffs provide no evidence whatsoever that convicted felons sentenced only to probation outside of Shannon County have ever been or are being removed from voter registration lists.

Next, the Plaintiffs must show that the proposed class members tried to vote and were denied a provisional ballot. Plaintiffs make no such allegations. The proposed plaintiff class has no standing unless they were injured – unless they tried to vote and were denied the opportunity.

Plaintiffs give no indication that the potential plaintiff class "is no numerous that joinder of all members is impracticable." Fed. R. Civ. P. § 23. In essence, Plaintiffs want the Court to believe, without any factual support or even allegations, that because Shannon County allegedly wrongfully removed two felons' names from voter registration lists, every other county in South Dakota has done the same. Plaintiffs provide no indication whatsoever that support that contention. Moreover, Plaintiffs provide no demonstration of the number of potential plaintiffs that may exist.

"The size of the class and the impracticability of joinder must be positively shown and not merely speculative." Kohn v. Mucia, 776 F.Supp. 348, 352 (N.D. Ill. 1991), citing Marcial v. Coronet Ins. Co., 880 F.2d 954 (7th Cir. 1989). The Kohn court determined that the question was not "what is the precise size of the class," but rather "is the class sizable at all?" Id. at 353. The Kohn plaintiff had presented no basis to indicate the existence of plaintiff class members. Therefore, the Kohn court denied class certification.

The Kohn court recognized that plaintiff Kohn had no grounds for bringing a case against any member of the defendant class except the defendant named. Id. at 355. Therefore, Kohn had to show a juridical link exception in order to certify a defendant class. Id. at 354-355. One of the reasons the court denied defendant class certification was that plaintiff Kohn offered no reason to believe that the county sheriffs and city police departments of Illinois would not comply with the court's ruling regarding the constitutionality of the law at issue.

Plaintiffs have provided no reason to believe that other South Dakota county officials would not comply with the Court's ruling should the Court find Shannon County officials' conduct unconstitutional or a violation of statute.

2. Questions of law or fact common to the class

As indicated above, Plaintiffs have failed to show that any other potential plaintiffs exist outside of Shannon County, and therefore cannot show that anyone else has similar questions of law or fact common to the class. The facts will likely differ from county to county, and therefore the applicable law will likely differ as well.

3. Claims or defenses of the representative plaintiffs are not typical of the claims of the class

Plaintiffs provide no factual support whatsoever for their claim that other counties have been disenfranchising convicted felons regardless of the sentence imposed. Plaintiffs cannot

claim that the lead plaintiffs are typical of the plaintiff class when they have not identified any other potential member of the plaintiff class.

4. The representative plaintiffs will not fairly and adequately protect the interests of the class

Plaintiffs must prove that the lead plaintiffs and Plaintiffs' class counsel will protect each class members' interests. It is likely that any other class members that exist will be far more interested in monetary compensation that injunctive relief. All indications thus far demonstrate that Plaintiffs' counsel are far more interested in injunctive relief than monetary damages. Many potential plaintiff class members may desire to quickly settle their claims for a monetary award rather than draw out the litigation in order for Plaintiffs' counsel to obtain wide-ranging injunctive relief (that may or may not affect that plaintiff class member) and the attorney's fees that follow. Each member of the plaintiff class may have very divergent wishes for the outcome of their claim.

Without any estimation of how many potential plaintiff class members there are, if any, Plaintiffs' counsel cannot possibly effectuate an appropriate monetary award for each plaintiff class member. Plaintiffs' counsel could not possibly adequately protect the interests of each plaintiff class member without knowing how many exist, assessing their monetary damages unique to each member's situation, and recovering monetary damages for each of those class members.

Plaintiffs must satisfy each of the four prerequisites before a class action may be certified. Plaintiffs cannot and have not done so.

A. Prerequisites for Defendant Class

1. The Defendant class is not so numerous that joinder of all members is impracticable.

Plaintiffs seek to sue all 66 counties (64 county auditors) in this class action. Plaintiffs seek to sue each county auditor in both her official as well her individual capacity. Plaintiffs are seeking monetary damages, putting the personal assets of each auditor on the line in this litigation.

It is easy to ascertain each county's auditor. Plaintiffs' attorney has already contacted each county auditor requesting information for this lawsuit, so Plaintiffs have the names and contact information of all county auditors in South Dakota already. It cannot be legitimately argued that adding each auditors' name to the complaint is impracticable.

Each auditor must be provided due process, with notice served upon them. To afford due process, each auditor must be allowed to retain defense counsel to adequately protect their personal assets as well as defend them in their official capacity. These auditors should be served with service of process in order to adequately protect their due process rights.

Moreover, it is likely that many or all counties other than Shannon have no liability in this matter. Plaintiffs have offered no factual support whatsoever that any other potential plaintiffs exist due to any other counties' conduct. All county auditors should not be subjected to official and personal liability when plaintiffs can provide no support that these auditors may be liable in this action. If there are other potential plaintiffs, those plaintiffs may bring a lawsuit against their county auditor. All county auditors should not be sued so that Plaintiffs' counsel can fish for discovery in order to locate more plaintiffs that may or may not exist.

Accordingly, Plaintiffs cannot meet Rule 22 prerequisite number 1.

2. There may be no common questions of law or fact

As indicated above, Plaintiffs have failed to show that any other potential defendants exist, and therefore cannot show that any other auditor has similar questions of law or fact common to the class of defendant auditors. The facts will likely differ from county to county, and therefore the applicable law will likely differ as well.

3. The Defenses of each county auditor may not be typical of the defenses of the current Defendants

Typicality must exist in "types of facts or evidence typical of the class." Vargas v. Calabrese, 634 F.Supp. 910, 920 (D.N.J. 1986). Facts and evidence are required, not conclusory allegations devoid of any factual support.

Again, Plaintiffs have not established that any other county auditor is violating the law. If such potential defendant auditors exist, each auditor may have varying defenses to those claims. For instance, other counties may indisputably contact felons they are wrongfully removing from the registration list, allowing the felon to stop his removal before election day. Or, a wrongfully-removed felon may be able to vote provisionally and have his provisional ballot counted in other counties, curing any injury.

Defendant Ganje is represented by counsel through a liability policy provided by the South Dakota Public Assurance Alliance ("SDPAA"). Not all counties within the State of South Dakota are members of the SDPAA. Shannon County and their liability provider should not be burdened with the financial onus of providing the expensive defense of 63 other county auditors. Defendants' counsel likely will not be paid for the portions of the case which litigate conduct in non-SDPAA counties, and therefore will not provide such a defense. Shannon County's policy will not pay for monetary damages or ACLU attorney fees incurred due to other counties' conduct.

Shannon County should not be burdened with the potentially enormous expense of defending 65 other counties. The ACLU attorneys' fees, incurred in prosecuting a case against all county auditors, are included in such potential liability. If the Court awards the plaintiff class attorneys' fees and costs in this case, determining which costs should be incurred against which of 66 counties would be a nightmare. Defendant class certification should be denied for this reason alone.

Moreover, counties which have no liability should not have to defend themselves at all or pay any portion of Plaintiffs' attorneys' fees – they should not be a party in the first place. Plaintiffs have the burden of demonstrating that all members of the defendant class meet the criteria in Rule 22. Irby v. Fitz-Hugh, 693 F.Supp. 424, 431 (E.D.Va. 1988).

With such a tremendous amount in monetary damages on the line, each county auditor must be allowed to submit the claim against them to their insurer and be represented by separate counsel of their choice. Each of the 64 county auditors is entitled to personal representation in order to defend against the claims brought against each auditor in his/her individual capacity. Perhaps each county auditor will have varying degrees of personal and official liability. Numerous attorneys may notice their appearance as defense counsel in this case. Rule 23(c)(2)(B)(i)(v) indicates "that a class member may enter an appearance through an attorney if the member so desires."

This Court would likely see numerous immediate motions to dismiss by those county auditors having no liability in this case. Therefore, class certification would only greatly increase the Court and all parties' work load rather than simplify it. In order to avoid such a waste of time and resources, the Plaintiffs must be required to show that the defendant class has

potential liability under evidence submitted to the Court. Plaintiffs have failed to provide any such evidence.

Plaintiffs have not satisfied prerequisite number 4 under Rule 23.

4. Plaintiffs do not satisfy Rule 23(b)(1)

Plaintiffs make no attempt to demonstrate that prosecuting separate actions against separate county auditors would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for county auditors. Nor to Plaintiffs argue that individual adjudications against county auditors would be dispositive of the interests of other class members not party to the cases filed individually. Therefore, Plaintiffs have not satisfied Rule 23 (b)(1).

5. Plaintiffs do not satisfy Rule 23(b)(2)

Under Fed. R. Civ. P. 23(b)(2), Plaintiffs must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Plaintiffs allege in conclusory fashion that an order from this Court forcing Ganje to comply with her statutory and constitutional mandates would constitute relief generally applicable to the entire plaintiff class. Doc. 127 p. 8. Plaintiffs provide no factual support that Defendant Ganje's conduct affected or can affect anyone outside of Shannon County. The county auditor for Shannon County cannot and does not do anything that could constitute relief applicable to potential plaintiff class members throughout the state. Ganje's actions or omissions do not "apply generally to the class" and therefore do not satisfy Rule 23(b)(2).

Plaintiffs may rely on their contention that the state defendants' actions affect the entire plaintiff class generally. It is undisputed, however, that only county auditors can remove voter

registrants' names from the registration list. Therefore, Plaintiffs have not satisfied Rule 23(b)(2).

6. Plaintiffs do not satisfy Rule 23(b)(3)

Plaintiffs have not satisfied Rule 23(b)(3), which requires Plaintiffs to show that questions of law or fact predominate over questions affecting individual members, and that a class action is superior to separate lawsuits. Plaintiffs have not shown that there would be any separate lawsuits, as they have no evidence indicating that any other county auditor has wrongfully disenfranchised a convicted felon.

Because there are no other identified plaintiff class members, Plaintiffs have not shown that other plaintiff class members are interested in a class action versus individual actions, as required under Rule 23(b)(3)(A). Plaintiffs cannot meet Rule 23(b)(3)(A), as no other litigation concerning this topic has been begun in the state. Concentrating the other non-existent litigation is not superior to individual actions, as indicated above. Plaintiffs cannot therefore meet Rule 23(b)(3)(C). Finally, the likely difficulties in managing this class action are significant, as indicated above, contrary to Rule 23(b)(3)(D).

7. Authorities

In Vargas v. Calabrese, 634 F.Supp. 910 (D.N.J. 1986), registered voters of Jersey City filed suit for declaratory relief and monetary damages on behalf of a proposed class of all registered minority voters. The Vargas plaintiffs alleged violations of the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, Section 2 of the Voting Rights Act, and 42 U.S.C. §1983, *inter alia.*

The Vargas case recognized that Rule 23 does not specifically address certification of defendant classes. Id. at 920. The Vargas court recognized that in practice, the certification process is not applied the same as in certifying plaintiffs' classes.

> . . . A defendant class action focuses on common defenses and typical defenses, rather than common claims and typicality of claims that concern plaintiff classes. In addition, rather than have a self-appointed champion of absent members of a plaintiff class to serve as a class representative, adequacy of representation in a defendant class must exist through an unwilling class representative chosen by a litigation adversary.

1 Newburg on Class Actions, Section 4.45 Defendant Classes, p. 372 (1982 ed.).

The Vargas Court denied the motion to certify a defendant class. The court found that "adequacy of representation is the quintessence of due process in class actions." *Id.* at 921 *citing* 1 Newburg on Class Actions, supra, at p. 376 citing Hansberry v. Lee, 311 U.S. 32 (1940). "In a defendant class action, assurance of typicality of defenses and a vigorous defense of the common issues are central to adequate representation." *Id.* at 921.

The Vargas court also was very concerned with the chilling effect class certification of defendants would place upon the legitimate exercise of political rights. Id. The Vargas court found election board workers were usually volunteers and received very small remuneration. Id. "They are exercising important constitutional rights to participate in the election process. If persons exercising their rights are subject to the risk of becoming defendants in class actions they might well be inhibited from participating in the election process at all. Thus, the Plaintiffs in the present case, who seek to protect their own voting rights, would be opening the doors to the deprivation of the constitutional rights of others. This, of course, cannot be permitted." Id. The Vargas court went on to indicate that the risk was so serious that the court would adopt special procedures to ensure that election board members joined as defendants in the case could assert their defenses with a minimum of expense and difficulty. Id. The Vargas court

recognized that the election board workers were confronted with a lawsuit funded and litigated by organizations having extensive resources and superior legal talents (the plaintiffs were represented by the ACLU, amongst others). The Vargas court was particularly concerned that innocent class defendants would be crushed by the burden of a complex lawsuit such as a class action voting rights lawsuit under the same causes of action at issue in the case at hand. Id. at 922.

The same concerns exist here as in Vargas. If county auditors are allowed to be sued in class actions, individually as well as officially, without proof of wrongdoing, it will become extremely difficult to find candidates interested in running for the office. It is often difficult to find candidates interested in such public offices, particularly in less-populated counties, when the job requires long hours with little pay. Add potential personal liability to the job, and counties will not be able to find qualified candidates to fill the county auditor position.

County auditors in South Dakota often struggle to find election poll workers. Allowing auditors to be sued as a class, particularly in a case in which a Native American poll worker was also sued as a defendant, county auditors will find it even harder to recruit poll workers. This lawsuit will undoubtedly make it far more difficult for Shannon County to find poll workers due Plaintiffs suing poll worker LaFawn Conroy.

In Irby v. Fitz-Hugh, 693 F.Supp. 424 (E.D.Va. 1988), plaintiffs sued under the Fourteenth and Fifteenth Amendment and § 2 of the Voting Rights Act. The Irby plaintiffs sought certification of both the plaintiff and defendant class. The Irby court denied class certification for plaintiffs, finding that the plaintiffs did not allege that every black resident to be included in the plaintiff class had been denied their voting rights. Id. at 431.

The Irby court also denied class certification of defendants, because many Virginia counties did not have a significant minority population and plaintiffs could not claim they were underrepresented in some school districts. Id. at 431. The court found that the plaintiff class may suffer from a lack of numerosity. Id. at 431-32. The court found that the factual questions concerning other class members' voting rights would vary from locality to locality. Id. Therefore the court denied certification of a defendant class. Id.

This case is similar to Irby. The Court should deny class certification for the same reasons.

Plaintiffs' Motion to Amend Complaint

Plaintiffs state on p.3- 4 of their memorandum in support of their motion to amend their complaint that the Secretary of State sent emails to county officials regarding the removal of felons even if those felons were sentenced to probation. Plaintiffs do *not* indicate to the Court that such emails discussed felons *on* probation, but not sentenced *only* to probation. Felons may, of course, be sentenced to penitentiary time but serve probation instead of pen time or serve probation after serving pen time. Felons only retain their right to vote if they were sentenced to probation only and not to a pen time. Plaintiffs are not candid with the Court when stating that such emails prove that felons who retained the right to vote under South Dakota law were wrongfully disenfranchised. That is likely why Plaintiffs did not attach any such emails to their briefing.

Defendants go on to state on p. 4-5 that these emails and other documents prove the "Defendants" have engaged in a statewide practice of disenfranchising *all* felons. If this were true, Plaintiffs would have attached exhibits so indicating. Again, communications by the Secretary of State regarding felons who serve probation is irrelevant. Plaintiffs themselves have

defined their class of plaintiffs as felons who were sentenced to probation *only*. Most felons sentenced to the pen (and who therefore lose their right to vote) also serve probation. Such individuals are not within the Plaintiffs' proposed class, and discussion of emails discussing their inability to vote is irrelevant. In any event, Plaintiffs provided no documents or other proof to the Court in order to satisfy their burden.

Plaintiffs' motion to amend their complaint should be denied for the same reasons indicated above regarding class certification.

Dated this 1st day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify on the 1st day of March, 2010, a true and correct copy of Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Plaintiffs' Motion to Amend Complaint were served electronically through the CM/ECF system upon the following individuals:

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