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. MADSEN, RICHARD CASEY, KAREN M. LAYHER, and LINDA LEA M. VIKEN, in their individual and official capacities as members of the State Board of Elections; SUE GANJE, in her official and individual Capacity as Auditor for Shannon County; LA FAWN CONROY, in her individual and official capacity as a poll worker for Shannon County, Defendants.	)	Civ. No. 09-5019 STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

COME NOW Defendants Chris Nelson, Matt McCaulley, Cindy Schultz, Christopher W. Madsen, Richard Casey, Karen M. Layher, and Linda Lea Viken, (hereinafter referred to as "State Defendants"), and submit this Response to Plaintiffs' Motion for Class Certification (Doc. 126) and memorandum in support of that motion (Doc. 127). Because the Plaintiffs have not met their burden to certify a class action, State Defendants respectfully request that the Court deny Plaintiffs' motion.

I. General Principles

Plaintiffs have the burden of establishing that a class action should be certified. Bishop v. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n, 686 F.2d 1278, 1288 (8th Cir. 1982). To meet this burden, Plaintiffs must satisfy all requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Blades v. Monsanto Co., 400 F.3d 562, 568-69 (8th Cir. 2005). Those requirements are discussed below.

A trial court's determination regarding whether a class action may be maintained is generally reviewed under an abuse of discretion standard. Shapiro v. Midwest Rubber Reclaiming Co., 626 F.2d 63, 71 (8th Cir. 1980). However, the Court must apply a rigorous analysis to determine if the prerequisites to certification have been satisfied. General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372 (1982); Elizabeth M. v. Montenez, 458 F.3d 779, 784 (8th Cir. 2006); Bishop, 686 F.2d at 1287. In addition, "[t]hough class certification is not the time to address the merits of the parties' claims and defenses, the 'rigorous analysis' under Rule 23 must involve consideration of what the parties must prove." Elizabeth M., 458 F.3d at 786. The standard for reviewing a motion for class certification is different than the standard for a 12(b)(6) motion to dismiss; the Plaintiffs are not entitled to have the allegations in their pleadings simply accepted

as true. Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365-67 (4th Cir. 2004).

II. Proposed Plaintiff Class and Subclass – Rule 23(a) Requirements

In their motion, Plaintiffs describe the class as "all registered persons in South Dakota who have been convicted of a felony, but not sentenced to imprisonment and, thus, remain eligible to vote under SDCL 23A-27-35." (Doc. 126, p. 1). In their proposed Second Amended Complaint, Plaintiffs define the class as "all South Dakota residents convicted of a felony and sentenced to probation and considered by Defendants ineligible to vote based on that conviction." (Doc. 124, Attachment 1, p. 18). Plaintiffs define the proposed subclass as "all Native American residents in South Dakota who have been convicted of a felony, but not sentenced to imprisonment and, thus, remain eligible to vote under SDCL 23A-27-35." (Doc. 124, Attachment 1, p. 18).

The only support provided for these class definitions are the conclusory allegations of the proposed Second Amended Complaint. Plaintiffs claim that Defendants "have implemented and enforced a policy, practice, and procedure which automatically removes a registered voter convicted of a felony from the voter registration rolls regardless of criminal sentence imposed." (Doc. 124, Attachment 1, p. 2). At most, Plaintiffs make a bare assertion, without details, that discovery produced

by State Defendants somehow demonstrates a statewide practice of disenfranchising all felons, regardless of sentence.[1] (Doc. 125, pp. 4-5).

A. *Rule 23(a)(1) - Class so numerous that joinder of all members is impracticable (Numerosity).*

Although no arbitrary rules regarding class size have been established, Plaintiffs have the burden to establish numerosity. Belles v. Schweiker, 720 F.2d 509, 515 (8th Cir. 1983). This requires some reliable standard or estimate regarding the class size and a demonstration that joinder of all individual members is impracticable. Id.; Coleman v. Watt, 40 F.3d 255, 259 (8th Cir. 1994).

Plaintiffs estimate the size of the plaintiff class to include all felons sentenced to probation in the state and federal criminal justice system, and the size of the subclass to include all Native Americans in that class. (Doc. 127, p. 4). However, this estimate is based solely on Plaintiffs' conclusory allegation that every one of these persons has been taken off the voting rolls. (Doc. 124, Attachment 1, p. 2). Plaintiffs have presented no specific details of any policy, practice, or procedure which allegedly resulted in the removal of all felons from the voter rolls. Moreover, Plaintiffs have failed to present any information regarding the number of felons actually disenfranchised and the counties allegedly involved. As a result, Plaintiffs have provided no reliable estimate of the class and subclass at issue and no reliable demonstration that joinder is impracticable. Belles, 720 F.2d at 515; Gariety, 368 F.3d at 365-67.

[1] State Defendants obviously deny such allegations.

Therefore, Plaintiffs have failed to meet their burden on the numerosity requirement.

B. *Rule 23(a)(2)&(3) - Questions of law or fact common to the class (Commonality), and claims or defenses of the representative parties typical of the claims or defenses of the class (Typicality).*

Regarding the second and third requirements of Rule 23(a), the U.S. Supreme Court has stated as follows:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Falcon, 457 U.S. at 158, n. 13.

In regard to the typicality requirement, it "requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff." Paxton v. Union National Bank, 688 F.2d 552, 562 (8th Cir. 1982) (citation omitted). The Plaintiffs cannot meet their burden on this element through general conclusory allegations in their pleadings. Paxton, 688 F.2d at 562. See also Belles, 720 F.2d at 515; Walker v. World Tire Corp., Inc., 563 F.2d 918, 921 (8th Cir. 1977). In fact, "[t]he propriety of class action status can seldom be determined on the basis of pleadings alone." Walker, 563 F.2d at 921 (Indicating that documentary evidence or an evidentiary hearing may be necessary).

As explained above, Plaintiffs have presented only the conclusory allegations in their proposed amended complaint in support of their motion. This is clearly insufficient to demonstrate the commonality and typicality requirements. As a result, Plaintiffs have not met their burden on these prerequisites.

C. *Representative Parties Will Fairly and Adequately Protect the Interests of the Class*

The final prerequisite of Rule 23(a) is that the named plaintiff can properly represent the interests of the class. "The district court is under an obligation 'to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)" Bishop, 686 F.2d at 1288 (quoting Falcon, 102 S.Ct. at 2371).

As referenced above, Plaintiffs have not adequately defined the class at issue because they rely only on conclusory allegations. Plaintiffs therefore cannot demonstrate that they will fairly and adequately represent the interests of the class as required by Rule 23(a)(4).

For the reasons stated above, the Plaintiffs have not established the Rule 23(a) prerequisites required to certify the plaintiff class and subclass. As a result, their motion should be denied.

III. Proposed Defendant Class – Rule 23(a) Requirements

Plaintiffs define the proposed defendant class, who are being sued in their official and individual capacities, as "all South Dakota county auditors who are responsible for maintaining and safeguarding the voter registration records for their respective counties pursuant to SDCL 12-4-

2." (Doc. 124, Attachment 1, p. 6). This proposed class does not meet the requirements of Rule 23(a) for the following reasons.

First, regarding the numerosity requirement, Plaintiffs have failed to define which county auditors are allegedly improperly removing felons from the voting rolls. Therefore, they arguably have not provided a reliable estimate of the defendant class. Belles, 720 F.2d at 515.

However, even if the class were considered to be all sixty-six county auditors, Plaintiffs must show that joinder is impracticable. In determining numerosity, courts may consider the number of persons in the class, the nature of the action, the size of individual claims, the inconvenience of individual suits, and any other relevant factors. Paxton, 688 F.2d at 559-60. Moreover, the easy identification of all class members makes joinder "more likely to be practicable." Andrews v. Bechtel Power Corp., 780 F.2d 124, 132 (1st Cir. 1985).

As explored more fully below, there are due process concerns surrounding the proposed defendant class of county auditors. This factor, in combination with the fact that all auditors are readily identifiable, weighs in favor of joinder and indicates that the numerosity requirement has not been satisfied.

Second, as stated above, Plaintiffs cannot simply rely on the allegations of their complaint to establish commonality and typicality. Not only have Plaintiffs made only conclusory allegations of any statewide policy or procedure, they have also made no allegations

regarding actions of specific county auditors in the defendant class. Therefore, the typicality and commonality prerequisites have also not been met.

Finally, the named Defendants cannot fairly and adequately protect the interests of the proposed defendant class. In addition to injunctive relief, Plaintiffs are seeking damages from all defendants. This certainly creates the potential for conflicting interests between the named defendants and proposed defendant class which indicate that the final requirement of Rule 23(a) has not been met.

In summary, the Rule 23(a) requirements have not been met regarding the defendant class. Even if those requirements could be met, however, joinder of this class is not allowed under Rule 23(b)(2).

IV. Rule 23(b)(2) Requirements

Plaintiffs attempt to certify both the plaintiff and defendant classes under Rule 23(b)(2). This rule states:

> A class action may be maintained if Rule 23(a) is satisfied and if … the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole.

Fed. Rule Civ. Proc. 23(b)(2).

However, certification of these classes under Rule 23(b)(2) is not proper for several reasons. First, the language of Rule 23(b)(2) itself does not authorize certifying the defendant class at issue. This language covers when the party on the opposite side of the litigation from the

class, in other words, "the party opposing the class," has acted or refused to act in some manner. Tilley v. TJX Companies, Inc., 345 F.3d 34, 39-40 (1st Cir. 2003); Henson v. East Lincoln Township, 814 F.2d 410, 414-15 (7th Cir. 1987); Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980). The language does not fit defendant classes because the representative defendant is normally not on the opposite side of the defendant class. Id. Moreover, the allegations are not that the Plaintiffs, who are the parties "opposing" the proposed defendant class, acted or refused to act. As a result, the plain language of Rule 23(b)(2) does not allow for certification of the defendant class of county auditors. Id.

Second, even if a defendant class were allowed under Rule 23(b)(2), due process concerns weigh against certifying the defendant class at issue. Rule 23(b)(2) classes are referred to as "mandatory" classes because they generally do not require a court to provide individual members of the class with notice and the opportunity to opt out. In re: St. Jude Medical, Inc., 425 F.3d 1116, 1121 (8th Cir. 2005); Coleman v. General Motors Acceptance Corp., 296 F.3d 443, 447 (6th Cir. 2002). For these reasons, mandatory class actions with damages claims implicate due process principles. These principles are that one should not be bound by a judgment in an action in which he or she has not been made a party by service of process. Ortiz v. Fibreboard Corp., 527 U.S. 815, 846-47, 119 S.Ct. 2295, 2314-2315 (1999). See also DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1175 (8th Cir. 1995). (Recognizing potential

for due process problems in a mandatory class action under Rule 23(b)(2), but finding that class member had waived any objection).

These due process concerns are even more evident here because Plaintiffs are requesting money damages against a defendant class of county auditors in their individual capacities. (Doc. 124, Attachment 1, pp. 6-7, 19). Therefore, certifying the defendant class under Rule 23(b)(2) has the potential to result in an individual money judgment against each auditor without proper notice and opportunity to be heard. This weighs against certifying the defendant class under Rule 23(b)(2).

Third, even if Plaintiffs could get past these hurdles in regard to the defendant class, certification of either the plaintiff or defendant class under Rule 23(b)(2) is only allowed only if "the primary relief sought is declaratory or injunctive." St. Jude, 425 F.3d at 1121. Only when damages are incidental to the prayer for injunctive relief does Rule 23(b)(2) apply. DeBoer, 64 F.3d at 1175-76.

Incidental damages "should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998). Such damages must be capable of computation by objective standards. Id. Therefore, "one critical factor is whether the compensatory relief requested requires individualized damages determination or is susceptible to calculation on a classwide basis." Coleman, 296 F.3d at 448.

In this case, Plaintiffs have provided no objective standards regarding calculation of damages. In fact, they barely mention their damages claim. (Doc. 127, p. 10). As a result, they have provided nothing to determine whether their damages are incidental to their claims for injunctive relief.

In summary, Plaintiffs have not met their burden for certification of either plaintiff or defendant classes under Rule(b)(2), and their motion should be denied on that basis.

For the reasons stated above, the State Defendants respectfully request that the Court deny the Plaintiffs' motion for class certification.

Dated this 1st day of March, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, a true and correct copy of State Defendants' Response to Plaintiffs' Motion for Class Certification was served electronically through the CM/ECF system upon the following persons:

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