

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

ARKANSAS VOTER INTEGRITY
INITIATIVE, INC., CONRAD REYNOLDS,
and DONNIE SCROGGINS

PLAINTIFFS

vs.

Case No. 60cv-22-8658

JOHN THURSTON, in his official capacity
as ARKANSAS SECRETARY OF STATE,
the ARKANSAS STATE BOARD OF
ELECTION COMMISSIONERS, in its
official capacity, and ELECTION SYSTEMS
AND SOFTWARE, LLC

DEFENDANTS

**ANSWER TO AMENDED COMPLAINT ON BEHALF OF SEPARATE DEFENDANTS
ARKANSAS SECRETARY OF STATE JOHN THURSTON AND “ARKANSAS STATE
BOARD OF ELECTION COMMISSIONERS, IN ITS OFFICIAL CAPACITY”**

Come Separate Defendants John Thurston, in his official capacity as Arkansas Secretary of State, and the “Arkansas State Board of Election Commissioners, in its official capacity,” and for their Answer to the Amended Complaint for Declaratory Judgment, Violation of the Arkansas Deceptive Trade Practices Act, an Illegal Exaction, Fraud, Motion for Injunction, and Motion to Expedite, state as follows:

1. They admit the allegations in paragraph 1.
2. They admit paragraph 2 states this lawsuit seeks class action status as to Count III (illegal exaction), Count IV (violation of the Arkansas Deceptive Trade Practices Act (“ADTPA”)), and Count V (fraud). They deny, however, that Plaintiffs have properly pled entitlement to these claims and further deny that Plaintiffs have satisfied any claim for “class action status.” Any remaining allegations in paragraph 2 are denied.

3. They admit the Amended Complaint seeks a declaratory judgment. All remaining allegations in paragraph 3 are denied.

4. They admit Plaintiffs claims this lawsuit seeks an illegal exaction through a class action lawsuit on behalf of all Arkansas taxpayers, reimbursement of illegally spent tax dollars, and compensatory and punitive damages for violation of the ADTPA and fraud. They deny, however, that Plaintiffs have properly pled entitlement to these claims, that Plaintiffs have satisfied any claim for “class action status,” and entitlement to compensatory and punitive damages. Any remaining allegations in paragraphs 4, 5, 6, and 7 are denied.

5. They admit Plaintiffs seek a temporary and permanent injunction to prevent the use of Election Systems & Software, LLC (hereinafter “ES&S”) machines in future elections but deny Plaintiffs are entitled to an injunction pursuant to Arkansas case law and Ark. R Civ. P. 65. Any remaining allegations in paragraph 8 are denied.

6. They are without knowledge or information sufficient at this time to admit or deny the allegations stated in paragraphs 9, 10, and 11.

7. They admit the allegations in paragraph 12.

8. They admit that the State Board of Election Commissioners consists of a seven-member board comprised of the Secretary of State as Chairperson, two members appointed by the Governor, and one member each appointed by the chair of the state Democratic party, the chair of the state Republican party, the President Pro Tempore of the Arkansas Senate, and the Speaker of the Arkansas House of Representatives. Any remaining allegations in paragraph 13 are denied.

9. They admit that ES&S manufactures the voting machines used in Arkansas elections. All remaining allegations in paragraph 14 are directed to said separate defendant, and therefore, no response is required of these Defendants.

10. Responding to paragraph 15, they restate and reallege their responses to paragraphs 1 through 14 of the Amended Complaint as if set forth herein word for word.

11. The public information available published by ES&S regarding the manufacture of ExpressVote Universal Voting System and DS200 speaks for itself. Any remaining allegations in paragraph 16 are denied.

12. They admit that Arkansas uses ES&S voting equipment. Any remaining allegations in paragraph 17 are denied.

13. They admit that Arkansas has contracted with ES&S for voting equipment and servicing, the terms of which are set forth by written contract that speaks for itself. They deny that any document labeled "Exhibit 1" is attached or enclosed with the Amended Complaint. Any remaining allegations in paragraphs 18 and 19 are denied.

14. They admit that ES&S voting equipment is comprised of various parts, including hardware and software. They acknowledge Plaintiffs' statement that the focus of their Amended Complaint is the ExpressVote and DS200 tabulator. Any remaining allegations in paragraph 20 are denied.

15. The information published by ES&S regarding ExpressVote speaks for itself. Any remaining allegations in paragraph 21 are denied.

16. They admit that Arkansas voters who vote at a polling site via voting machine are using an ExpressVote device. They deny that all Arkansas voters mark their ballots via the ExpressVote device and deny that voting machines are the only method for casting votes in Arkansas. Any remaining allegations in paragraph 22 are denied.

17. The public information available published by ES&S regarding the DS200 speaks for itself. Any remaining allegations in paragraph 23 are denied.

18. They state Ark. Cod. Ann. § 7-5-504 speaks for itself. They admit that paragraph 24 references subsection 21(A)-(C) of this statute. Any remaining allegations in paragraph 24 are denied.

19. They state Ark. Cod. Ann. § 7-5-504(6), 52 U.S.C. § 21081(a)(1)(A)(i), and Ark. Cod. Ann. § 7-5-606(e) speak for themselves. Any remaining allegations in paragraph 25 are denied.

20. The product information for ExpressVote published by ES&S speaks for itself. Any remaining allegations in paragraphs 26, 27, and 28 are denied.

21. They admit that at polling locations utilizing a DS200 ballot scanner and tabulator, the voter carries his or her ballot to the device and inserts it to be counted. In location that are utilizing a central count process, the voter deposits his or her ballot into a secure ballot box for the ballot to be counted at a centralized DS200 ballot scanner and tabulator. Any remaining allegations in paragraph 29 are denied.

22. The allegations in paragraph 30 are denied.

23. The product information for DS200 published by ES&S speaks for itself. All remaining allegations in paragraphs 31 and 32 are denied.

24. They deny the allegations in paragraphs 33 and 34.

25. Responding to paragraph 35, they restate and reallege their responses to paragraphs 1 through 34 of the Amended Complaint as if set forth herein word for word.

26. They state Ark. Cod. Ann. § 16-111-102 regarding this Court's power to construe speaks for itself. Any remaining allegations in paragraph 36 are denied.

27. They deny the allegations in paragraphs 37 and 38.

28. Responding to paragraph 39, they restate and reallege their responses to paragraphs 1 through 38 of the Amended Complaint as if set forth herein word for word.

29. They state 52 U.S.C. § 21081(a)(1)(A)(i) speaks for itself. Any remaining allegations in paragraph 40 are denied.

30. They admit the allegations in paragraph 41.

31. The allegations in paragraphs 42, 43, 44, 45, 46, 47, 48, and 49 are denied.

32. Responding to paragraph 50, they restate and reallege their responses to paragraphs 1 through 49 of the Amended Complaint as if set forth herein word for word.

33. They acknowledge the Arkansas Supreme Court in *McGhee v. Arkansas State Bd. of Collection Agencies*, 360 Ark. 363 (2005) discusses the two types of illegal exactions. Any remaining allegations in paragraph 51 are denied.

34. They deny Plaintiffs allegations regarding their claim for illegal exaction and, therefore, the allegations in paragraph 52 are denied.

35. Section 19-5-1247 of the Arkansas Code speaks for itself. All remaining allegations in paragraphs 53 and 54 are denied.

36. Pleading affirmatively, they state that by and large, Arkansas historically uses federal Help America Vote Act (HAVA) grant funds to purchase county election equipment. All funds are subject to and are federally audited.

37. They deny the allegations in paragraphs 55, 56, 57, 58, 59, 60, and 61.

38. They deny the allegations in paragraph 62. Pleading affirmatively, they state Plaintiffs are not entitled to attorney's fees and costs under Arkansas law for their illegal exaction claim. *See* Ark. Code Ann. § 26-35-902; *Gibson v. Buonaiuto*, 2022 Ark. 206, 655 S.W.3d 59.

39. Responding to paragraph 63, they restate and reallege their responses to paragraphs 1 through 62 of the Amended Complaint as if set forth herein word for word.

40. The allegations in paragraphs 64, 65, 66, 67, 68, and 69, including all subparts thereto, are only directed to ES&S, and therefore, no response is required of these Defendants.

41. They state that Ark. Code Ann. § 4-88-113(f) states in pertinent part:

(f)(1) (A) A person who suffers an actual financial loss as a result of his or her reliance on the use of a practice declared unlawful by this chapter may bring an action to recover his or her actual financial loss proximately caused by the offense or violation, as defined in this chapter.

(B) A private class action under this subsection is prohibited unless the claim is being asserted for a violation of Arkansas Constitution, Amendment 39.

(2) To prevail on a claim brought under this subsection, a claimant must prove individually that he or she suffered an actual financial loss proximately caused by his or her reliance on the use of a practice declared unlawful under this chapter.

See Ark. Code Ann. § 4-88-113(f). Amendment 89 to the Arkansas Constitution sets forth the provisions governing the limits on interest rates on bonds issued by the governmental units in Arkansas, none of which are at issue in this lawsuit. Therefore, they deny all allegations in paragraph 70.

42. Responding to paragraph 71, they restate and reallege their responses to paragraphs 1 through 70 of the Amended Complaint as if set forth herein word for word.

43. The allegations in paragraphs 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81 are only directed to ES&S, and therefore, no response is required of these Defendants.

44. Responding to paragraph 82, they restate and reallege their responses to paragraphs 1 through 81 of the Amended Complaint as if set forth herein word for word.

45. They deny the allegations in paragraphs 83 and 84.

46. They deny that Plaintiffs have proved they are entitled to temporary and permanent injunction under Arkansas law, and therefore, deny the allegations in paragraph 85.

47. They deny Plaintiffs have pled facts sufficient to prove any entitlement to trial by jury on any matters in the Amended Complaint. Any remaining allegations in paragraph 86 are denied.

48. They deny the allegations in paragraph 87.

49. They deny that Plaintiffs are entitled to the relief sought in the Amended Complaint for Declaratory Judgment, Violation of the Arkansas Deceptive Trade Practices Act, an Illegal Exaction, Fraud, Motion for Injunction, and Motion to Expedite, including all requests for a refund of taxpayer fees and dollars, compensatory and punitive damages, attorney's fees, and costs. All remaining requests for relief in the Amended Complaint and WHEREFORE clause are denied.

50. Pleading affirmatively, they state that in 2002, Congress passed the Help America Vote Act of 2002 (HAVA), which created the U.S. Election Assistance Commission (EAC) and vested it with the responsibility of setting voting system standards and for providing for the testing and certification of voting systems. HAVA mandates that EAC accredit voting system test laboratories and certify voting equipment. All voting machinery used in elections in Arkansas were and are federally certified by the U.S. Election Assistance Commission (EAC) and comply with the EAC's Voluntary Voting System Guidelines (VVSG).

51. Pleading affirmatively, these Defendants state Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted and therefore the Amended Complaint must be dismissed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

52. Pleading affirmatively, Separate Defendant John Thurston, sued in his official capacity as Arkansas Secretary of State, is entitled to sovereign immunity on all monetary damages.

53. Pleading affirmatively, to the extent any of these allegations could be construed to be against any defendant in their individual capacity, these Defendants are entitled to qualified and statutory immunity against all monetary damages.

54. Pleading affirmatively, they state Separate Defendant "Arkansas State Board of Election Commissioners, in its official capacity" is not a proper defendant as the Arkansas State Board of Election Commissioners enjoys sovereign immunity and cannot be sued. Therefore, this case as against said Defendant must be dismissed with prejudice.

55. Pleading affirmatively, to the extent Plaintiffs intended to sue the Arkansas State Board of Election Commissioners, Plaintiffs lack standing to sue as it enjoys sovereign immunity and cannot be sued. Therefore, this case as against "Arkansas State Board of Election Commissioners, in its official capacity" must be dismissed with prejudice.

56. Pleading affirmatively, they state Plaintiff Arkansas Voter Integrity Initiative, Inc. is not a qualified elector and lacks standing to bring this claim against all defendants, and therefore, the Amended Complaint must be dismissed with prejudice.

57. Pleading affirmatively, these Defendants state Plaintiffs failed to satisfy the pleading requirements in their Amended Complaint, and therefore, it must be dismissed pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

58. Pleading affirmatively, they state and reserve the right to plead further any and all other affirmative defenses that may be applicable to this claim pursuant to Arkansas Rule of Civil Procedure 8(c) including, but not limited to, estoppel, res judicata, and waiver and, therefore, the Amended Complaint should be dismissed with prejudice.

59. Pleading affirmatively, they state sovereign immunity bars the award of attorney's fees and costs, and therefore, all such claims for relief should be denied.

60. Pleading affirmatively, they state no statutory authority exists for awarding attorney's fees and costs, and therefore, all such claims for relief should be denied.

61. Pleading affirmatively, they state Plaintiffs have failed to join EAC, which is an indispensable party to this action. Its interest in the controversy is such that no final judgment can be entered which will do justice between the parties without injuriously affecting its rights. Therefore, this case should be dismissed pursuant to Rule 19 of the Arkansas Rules of Civil Procedure.

62. They deny separately and specifically each and every material allegation of the Amended Complaint not herein admitted.

63. They request leave of Court to file an amended answer following the completion of discovery.

WHEREFORE, having fully responded to the Amended Complaint for Declaratory Judgment, Violation of the Arkansas Deceptive Trade Practices Act, an Illegal Exaction, Fraud, Motion for Injunction, and Motion to Expedite of Plaintiffs, Separate Defendants John Thurston, in his official capacity as Arkansas Secretary of State, and the "Arkansas State Board of Election Commissioners, in its official capacity," respectfully pray the original Complaint and all

amendments thereto be dismissed with prejudice and for all other just and proper relief to which they may be entitled.

Respectfully submitted,

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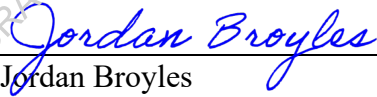
CERTIFICATE OF SERVICE

I, Jordan Broyles, certify that I have served the foregoing pleading on the following attorneys of record in this matter by filing same with the Court's electronic filing system on this

1st day of August, 2023:

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