

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

VANDROTH BACKUS, WILLIE) Civil Action No. 2:11-cv-03120-RMG-HFF-MBS
HARRISON BROWN, CHARLESANN)
BUTTONE, BOOKER MANIGAULT,)
EDWARD MCKNIGHT, MOSES MIMS,)
JR., ROOSEVELT WALLACE, and)
WILLIAM G. WILDER, on behalf of)
themselves and all other similarly situated)
persons,)

Plaintiffs,)

v.)

**MOTION TO DISMISS
DEFENDANT KEN ARD, IN HIS
CAPACITY AS LIEUTENANT
GOVERNOR**

THE STATE OF SOUTH CAROLINA,)
NIKKI R. HALEY, in her capacity as)
Governor, KEN ARD, in his capacity as)
Lieutenant Governor, GLENN F.)
MCCONNELL, in his capacity as President)
Pro Tempore of the Senate and Chairman of)
the Senate Judiciary Committee, ROBERT)
W. HARRELL, JR., in his capacity as)
Speaker of the House of Representatives,)
JAMES H. HARRISON, in his capacity as)
Chairman of the House of Representatives')
Judiciary Committee, ALAN D.)
CLEMMONS, in his capacity as Chairman)
of the House of Representatives' Elections)
Law Subcommittee, MARCI ANDINO,)
in her capacity as Executive Director of the)
Election Commission, JOHN H.)
HUDGENS, III, Chairman, CYNTHIA M.)
BENSCH, MARILYN BOWERS,)
PAMELLA B. PINSON, and THOMAS)
WARING, in their capacity as)
Commissioners of the Election)
Commission,)

Defendants.)

Defendant Ken Ard, Lieutenant Governor of South Carolina, hereby moves to dismiss the within action against him and, as grounds therefor, sets forth as follows:¹

STATEMENT OF THE CASE

The Plaintiffs herein filed their Amended Complaint in this case on November 23, 2011.² The gravamen of the Amended Complaint is that Act 71, Act 72 and Act 75 of 2011, which were passed into law earlier this year, resulted from race-based redistricting schemes in violation of the Plaintiffs' Fourteenth and Fifteenth Amendment rights, as well as the Voting Rights Act of 1965. The only specific allegation against the Lieutenant Governor is found at paragraph 19 of the Amended Complaint, wherein he is identified by name:

Defendant, **KEN ARD**, in his official capacity as Lieutenant Governor of South Carolina, is a proper defendant as the President of the South Carolina Senate charged with presiding over the Senate and ratifying bills upon passage by both houses of the General Assembly pursuant to Article III, Section 18 of the South Carolina Constitution.

Significantly, while there are numerous allegations in the Amended Complaint against “the Defendants” collectively, Lieutenant Governor Ard’s name appears nowhere else in the Amended Complaint but in the caption of the case.

The Lieutenant Governor was served with the Amended Complaint, and filed his Answer on December 19, 2011. In his Answer, the Lieutenant Governor issued a general denial and, further,

¹In accordance with Local Civil Rule 7.04, a full explanation of the motion is contained herein and a separate memorandum would serve no useful purpose.

²The Lieutenant Governor is uncertain when the original complaint was filed, as he was apparently not served with such document.

asserted the affirmative defense of immunity, and prayed for dismissal on the grounds that the Amended Complaint fails to state a cause of action as against him, for improper venue and for lack of personal jurisdiction.

ARGUMENT

1. The Plaintiffs have failed to state a claim against the Lieutenant Governor for which relief can be granted.

As a preliminary matter, the Plaintiffs' Amended Complaint fails to make any specific allegations of wrongdoing on the part of the Lieutenant Governor, for which relief can be granted to the Plaintiffs.

A complaint must contain more than simply labels and conclusions, and a formulaic recitation of the elements of a cause of action is insufficient. *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir.2009). The complaint should plead sufficient facts to allow a court, drawing on "judicial experience and common sense" to infer "more than the mere possibility of misconduct." Absent this, the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are "merely consistent with a defendant's liability" fail to nudge claims "across the line from conceivable to plausible." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir.2009). Moreover, while a court must accept as true the material facts alleged in a complaint, statements of bare legal conclusions "are not entitled to the assumption of truth" and are insufficient to state a claim. *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir.2011).

As indicated above, only paragraph 19 of the Plaintiffs' Amended Complaint even mentions the Lieutenant Governor by name, and this paragraph merely serves to identify him and the function

of his office – it makes no allegations of wrongdoing. The only remaining paragraphs which arguably³ refer to the Lieutenant Governor are 49, 50, 54, 58, 59, 60, 63, 64, 65, 66, 67, 68, 69, 78, 79, 81, 83 and 84. Of these, only one (paragraph 54) alleges a specific act taken on the part of “the Defendants”; the remaining paragraphs are nothing more than conclusory, subjective statements, asserting facts suggesting the “mere possibility of misconduct” on the part of the Lieutenant Governor. As for paragraph 54, the Lieutenant Governor certainly has not “filed suit in the United States District Court for the District of Columbia seeking judicial preclearance”, a fact that can be ascertained by this Court, and one of which the Defendant would ask this Court to take judicial notice. Thus, given the Plaintiffs’ failure to assert a claim against the Lieutenant Governor for which relief can be granted, the Amended Complaint should be dismissed as against him.

2. The Plaintiffs’ claims should be dismissed as against the Lieutenant Governor on the grounds that he is protected by sovereign immunity.

The Plaintiffs cannot maintain their action against the Lieutenant Governor because, in such capacity, he enjoys the same immunity from suit as the State of South Carolina.

As the Eleventh Amendment to the United States Constitution sets forth, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.” Although this Amendment technically “applies only to suits brought against a state by ‘Citizens of another State,’

³The term “arguably” is used here because these paragraphs refer to “the Defendants” collectively. While this phrasing could conceivably mean *all* of the Defendants, it most likely means *some* of the Defendants, given that certain allegations are quite obviously not meant to refer to the Lieutenant Governor. (See the explication of paragraph 54 of the Amended Complaint, hereinabove.)

it is well established that ‘an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.’ *Lytle v. Griffith*, 240 F.3d 404 (4th Cir.2001), quoting *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Furthermore, state officers acting in their official capacity – as was the Lieutenant Governor in the within case – are also entitled to Eleventh Amendment protection, because “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.” *Lytle* at 409, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); see also *Brown v. Lieutenant Governor’s Office on Aging*, 697 F.Supp.2d 632 (D.S.C. 2010) (officials in S.C. Lt. Governor’s Office on Aging are entitled to sovereign immunity under Eleventh Amendment).⁴

Accordingly, given the Lieutenant Governor’s sovereign immunity, the Plaintiffs’ Amended Complaint fails to state a claim against this Defendant for which relief can be granted, this Court lacks jurisdiction over the Lieutenant Governor⁵ and the Plaintiffs’ Amended Complaint should be dismissed as against him.

⁴While there is an exception to Eleventh Amendment immunity for state officers when suit is brought in a federal court to enjoin an officer from enforcing an unconstitutional statute, *see Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the exception should not apply here, as enforcement of statutes is not a constitutional duty of the Lieutenant Governor. *See* S.C. Const Art. IV, § 10 (“The Lieutenant Governor shall be President of the Senate, ex officio, and while presiding in the Senate, shall have no vote, unless the Senate be equally divided.”); S.C. Const Art. IV, § 11 (“In the case of the removal of the Governor from office by impeachment, death, resignation, disqualification, disability, or removal from the State, the Lieutenant Governor shall be Governor.”)

⁵Although it should be noted that Fourth Circuit case law, as pointed out by that Court, has been “unclear on whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)”, *see Andrews v. Daw*, 201 F.3d 521, n. 2 (4th Cir.2000), the Lieutenant Governor would submit that he is entitled to dismissal on either one or both theories.

3. The Plaintiffs' claims should be dismissed as against the Lieutenant Governor on the grounds that he is protected by legislative immunity.

The Lieutenant Governor is entitled not only to the protection of sovereign immunity, but legislative immunity, as well, necessitating that the within action be dismissed as against him.

When acting in a legislative capacity, the Lieutenant Governor is immune from suit. *See Eslinger v. Thomas*, 476 F.2d 225 (4th Cir.1973). The protection of the speech or debate clause of the of the United States Constitution⁶ has been extended by the Supreme Court to state legislators. *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). The scope of the privilege is not unlimited, but a senate resolution, for example, is protected to the same degree as words actually spoken in debate. *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). As the *Eslinger* Court noted, the "passing of acts and resolutions is the very essence of the legislative process, and any attempt to punish a legislator for such actions would manifestly tend to 'control his conduct as a legislator,' in derogation of the clause." *Eslinger*, at 228, *quoting Gravel*.

Thus, the Lieutenant Governor is also entitled to legislative immunity for the acts complained of by the Plaintiffs in their Amended Complaint, and the Amended Complaint should be accordingly dismissed as against him.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Plaintiffs' Amended Complaint as against Defendant Ken Ard, in his capacity as Lieutenant Governor.

⁶*See* U.S. Const. art. I, § 6, cl. 1 ("The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and . . . for any Speech or Debate in either House, they shall not be questioned in any other Place.")

Respectfully submitted,

s/Robert Bolchoz

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December 28, 2011

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