UNITED STATES DISTRICT COURT
For the
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JAN KOWALSKI AND ZIFF SISTRUNK, Plaintiffs, v. COOK COUNTY OFFICERS ELECTORAL BOARD, DAVID ORR, ANITA ALVAREZ AND DOROTHY BROWN, Defendants.	)	No. 16 CV 1891 Judge John W. Darrah

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs, JAN KOWALSKI and ZIFF SISTRUNK, by and through their attorney, Robert M. Kowalski, for their Response to the Defendants, COOK COUNTY OFFICERS ELECTORAL BOARD's ("COEB"), David Orr ("Orr"), Anita Alvarez ("Alvarez") and Dorothy Brown ("Brown"), Motion to Dismiss Plaintiffs' Amended Complaint, state as follows:

Introduction

Plaintiffs' Amended Complaint takes Defendants to task for its as-applied implementation and execution of its facially-neutral policies, customs, usages, regulations, rules and decisions to violate Plaintiffs' Federal statutes and Constitutional First and Fourteenth Amendment rights. The COEB failed to count 230 signatures at all and systematically disenfranchised 8, 500 signatures of which 95% were African-American voters by NOT synchronizing updated voter registration information. While these voters can vote, they cannot nominate a candidate. The application of its customs, standards, practices and procedures are so deeply engrained, institutionalized and

pervasive as to constitute a pattern of racketeering activity by repeatedly violating the Voting Rights Act of 1965, Section 1983 and 1985 civil rights violations and violations of the First, Eighth, Fourteenth and Fifteenth Amendments. Naturally, Defendants would like to bury Plaintiffs claims by relying on those self-same objectionable customs, standards, practices and procedures.

By way of example, Defendants claim Plaintiff failed to meet its facially neutral Rule 8 deadline. The Rule 8 deadline is only triggered once a record examination is concluded. As applied, however, the COEB failed to examine 230 signatures spanning 23 pages! How possibly could the Rule 8 deadline be triggered and the examination been complete if 230 signatures had not been examined?

Defendants' nonetheless claim that "plaintiffs were able to participate in the nomination process". This is as true as a canary with a broken wing playing with a cat. How possibly could Plaintiff Sistrunk have "participated" when his signature was not found in the outdated computerized voter registration database? Yet he did vote in the March primary. How possibly could Plaintiff Kowalski have "participated" when 8,500 signatories were disenfranchised?

Defendants now seek to dismiss Plaintiffs' claims suggesting a lack of standing. Defendants bootstrap the denial of injunctive relief into denial of any remedy! It is axiomatic that for every right, there is a remedy. Plaintiffs' remedy is to order her name to appear on the November general election ballot. Given the incumbent is the only name appearing on the November general election ballot, no harm will befall any candidate, no special election will be required, and the public will be made whole.

Defendants' 12(b)(1) Scattergun Motion to Dismiss

Plaintiffs' Amended Complaint contains 3 counts: Count 1: Section 1983 Civil Rights Violation; Count 2: Voting Rights Act; and Count 3: RICO.

Defendants' 12(b)(1) Motion to Dismiss embodies the shotgun approach in the desperate attempt for something to stick, challenging Plaintiffs' Amended Complaint on every conceivable ground including:

- Defendants' claim Plaintiffs' lack standing as to Counts 1 and 2. More specifically:
  - Defendants' claim Count 1 should be dismissed because Plaintiffs' have not suffered injury; there is no causal connection; and the injury cannot be redressed by a decision in their favor.
  - Defendants' claim Count 2 should be dismissed because Plaintiffs are not aggrieved under the Voting Rights Act.
- Defendants' seek dismissal predicated upon the Eleventh Amendment suggesting this court is barred from ordering Defendants, state officials, to conform their conduct to Federal law.
- Defendants' seek dismissal claiming the doctrine of res judicata of the otherwise unrelated state claims bars these federal claims.
- Defendants' seek dismissal claiming they are entitled to qualified immunity.

Rule 12(b)(1) Standards

A motion to dismiss pursuant to Rule 12(b)(1) tests the jurisdictional sufficiency of the complaint. "When ruling on a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the district court must

accept as true all well-pleaded factual allegations, and draw reasonable inferences in favor of the plaintiff." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995). But "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993) (quoting *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979)).

Standing Issue

A plaintiff's standing must exist at the time the complaint is filed. *Access 4 All, Inc. v. Chi. Grande. Inc.*, No. 06-C-5250, 2007 WL 1438167, at *4 (N.D. Ill. May 10, 2007) (citing *Lujan*, 504 U.S. at 571, n.4). "The Supreme Court has instructed us to take a broad view of constitutional standing in civil rights cases, especially where, as under the [federal act], private enforcement suits 'are the primary method of obtaining compliance with the Act.'" *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)). In addition, for purposes of determining standing, district courts "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995) (quotations omitted); see also *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."). Statements in the Complaint are accepted as true at this stage of the proceedings. *See Chi. Grande, Inc.*, No. 06-C-5250, 2007 WL 1438167, at *8.

"A motion to dismiss for lack of standing should not be granted unless there are no set of facts consistent with the complaint's allegations that could establish standing." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

Additionally, Defendants argue that the causation simply does not exist as a matter of fact. But, such arguments are the kind of "factual" as opposed to "facial" attack on jurisdiction that is more appropriate after discovery. *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) ("[A] factual challenge lies where the complaint is formally sufficient but the contention is that there is in fact no subject matter jurisdiction.") (internal quotations omitted). Once causation is sufficiently pleaded, further adjudication of causality is better left to summary judgment. *See Steele*, 2009 WL 393860, at *5 (noting that factual disputes over causation "cannot be resolved via a motion to dismiss"). Measured against the background principle that "[a] motion to dismiss for lack of standing should not be granted unless there are no set of facts consistent with the complaint's allegations that could establish standing," Plaintiffs have sufficiently alleged Article III causation to establish constitutional standing. *See Lac Du Flambeau Band*, 422 F.3d at 498.

Eleventh Amendment

The Eleventh Amendment provides:

> The 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, or by Citizens or Subjects of any Foreign State. *U.S. CONST. amend. XI.*

Put simply, "the Eleventh Amendment guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 457 (7th Cir. 2011). "If properly raised, the amendment bars actions in federal court against a state, state agencies, or state officials acting in their official capacities." *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 370 (7th Cir. 2010); see also *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). The Eleventh Amendment was intended "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Thus, it provides not merely a defense to liability but immunity from suit. *Id.* at 145-46.

Defendants here are a county board and county officers – not an Illinois board or Illinois officers. The Cook County Officers Electoral Board is not a sovereign "arm of the state" and has no Eleventh Amendment immunity. *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417 (2008). Defendants present no facts to determine whether the CCOEB and County Officers can be deemed an "arm of the state" for Eleventh Amendment purposes - no factors as its legal structure and its financial relationship to the state. *Id.* at 420-23; see also *Kashani v. Purdue Univ.*, 813 F.2d 843, 845-47 (7th Cir. 1987) (considering these same factors to determine whether university with ties to

the state was entitled to Eleventh Amendment immunity). The key elements for the inapplicability of Eleventh Amendment immunity remain: the COEB is NOT run by an Illinois state department and its funding is NOT part of the Illinois treasury. Thus, it is NOT entitled to Eleventh Amendment immunity.

Even then, Congress may abrogate a state's immunity from being sued in a Federal court by enacting legislation pursuant to its enforcement powers under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The Eleventh Amendment does not trump the Fifteenth Amendment or the Voting Rights Act of 1965. As a result of the individual state's resistance to enforcement of the Fifteenth Amendment, the Voting Rights Act of 1965 was passed in response to various state actor's restrictions of minorities' voting rights – so called Jim Crow laws. While the COEB may suggest the Eleventh Amendment provides it immunity from suit, the Fifteenth Amendment as made enforceable by Congress in Section 2 of the Voting Rights Act applies a nationwide prohibition against any actor – whether state, county or city – denying or abridging the right to vote. This nationwide prohibition including prohibiting Cook County from adopting policies and procedures to disenfranchise minority voters. The Eleventh Amendment does NOT provide immunity from compliance with the Fifteenth Amendment and Section 2 of the Voting Rights Act.

Res Judicata

Res judicata requires a federal court to recognize the claim and issue-preclusive effects of a state-court judgment. *Exxon Mobil*, 544 U.S. at 293. Federal courts must give "full faith and credit" to state court decisions. Federal courts are required to give Illinois state court judgments the res judicata effect that an Illinois court would give

them. *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 560 (7th Cir. 1999). Under Illinois law, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 302, 234 Ill.Dec. 783, 789, 703 N.E.2d 883, 889 (1998). The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit. *Id.* For the doctrine of res judicata to apply, Illinois requires that the following three criteria be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identify of cause of action, and (3) there is an identity of parties or their privies. *River Park, Inc.*, 184 Ill.2d at 302.

Plaintiff Kowalski's Illinois state claims for administrative review and violation of the Illinois Open Meetings Act proceeded through two levels of Illinois state court review. These are final judgments on the merits. The state court did not hear or pass on Plaintiff Kowalski's claims as to Federal Constitutional violations or Federal statutes – nor could it. These claims were not before it.

Further, Plaintiff Sistrunk was not a party to the state court proceedings. Kowalski, a female Caucasian, could not have represented the interests of Sistrunk, a male African American. Kowalski's interest is that of the candidate whose equal protection and freedom of association rights were violated by the COEB's actions. Sistrunk's interest is that of a minority voter whose right to freedom of association under the First and Fourteenth Amendments and violation of the Voting Rights Act were violated by the COEB's actions. Sistrunk has a stronger incentive to raise these issues then Kowalski, since the Defendants' actions affected him more squarely than Kowalski. There is no identity of interest. Nor is there privity since the same facts are

not essential to the maintenance of both proceedings and the same evidence is not needed to sustain both. Res judicata does not apply.

Qualified Immunity

The Seventh Circuit has warned that qualified immunity is generally not grounds for dismissal under Rule 12(b)(6). *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). "Because an immunity defense usually depends on the facts of the case," and because plaintiffs are "not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity," dismissal at the pleading stage is typically inappropriate. *Id.* (quoting *Jacobs v. City of Chi.*, 215 F.3d 758, 765 n.3 (7th Cir. 2000)).

"Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (quoting *Mitchell v. Forsyth*, All U.S. 511, 526 (1985)). When a qualified immunity defense is presented in a motion to dismiss, courts "apply the standard of review under Rule 12(b)(6), accepting as true the well-pleaded allegations of the complaint and the inferences that may be reasonably drawn from those allegations." *Stevens v. Umsted*, 131 F.3d 697, 706 (7th Cir. 1997) (quoting *Wilson v. Formigoni*, 42 F.3d 1060, 1064 (7th Cir. 1994)). Qualified immunity can be grounds for a Rule 12(b)(6) dismissal when the allegations of the complaint, taken as true, fail to allege the violation of a clearly established right. *Landstrom v. Ill. Dep't of Children & Family Servs.*, 892 F.2d 670, 675 (7th Cir. 1990).

In the instant proceeding, the Amended Complaint alleges with particularity the violation of clearly established federal rights. The clear failure to count 23 pages containing 230 voters' signatures on the nomination petition cannot be mere negligence

and raises the violation to the level of intentional malfeasance – clearly not warranting immunity.

Defendants' Scattergun 12(b)(6) Motion to Dismiss

Defendants' 12(b)(6) Motion to Dismiss suffers from the same shotgun infirmity:

- Defendants claim Count 2 should be dismissed because Plaintiffs failed to allege the CCOEB procedures and practices result in a denial of or abridgement of the right to vote on account of race or color.
- Defendants claim Count 1 should be dismissed because Plaintiffs' have failed to allege a civil rights violation.
- Defendants claim Count 1 should be dismissed because Plaintiffs' have failed to allege the procedural safeguards provided by state law are inadequate. Defendants claim their behavior was not shocking to the conscience.
- Defendants claim Count 3 should be dismissed because the COEB as a governmental entity cannot form a malicious intent which extends to its members and Plaintiffs claim is an impermissible collateral attack on the state court judgment violating the Rooker-Feldman doctrine.

Standard for 12(b)(6) Motion

Reviewing the sufficiency of a complaint, a district court must accept all well-pled facts as true and draw all permissible inferences in favor of the plaintiff. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 334 (7th Cir. 2012). The Federal Rules of Civil Procedure require only that a complaint provide the defendant with "fair notice of what the * * * claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The

Supreme Court has described this notice-pleading standard as requiring a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). While factual allegations must be accepted as true, legal conclusions may not be considered. *Id.* To survive a motion to dismiss pursuant to Rule 12(b)(6), the complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations in the complaint must at least "raise a right to relief above the speculative level." *Bell Atl. Corp.*, 550 U.S. at 555. The Court must accept as true all well-pleaded allegations in the complaint and draw all possible inferences in the plaintiff's favor. *See Tamayo*, 526 F.3d at 1081. Mere legal conclusions, however, "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

Civil Rights Violation

Application of Defendants' policies and practices violates each plaintiff's right to freedom of association in violation of the First and Fourteenth Amendments and Kowalski's disqualification violated her guaranteed right to equal protection under the Fourteenth Amendment. As a result, each plaintiff was denied his and her right to freedom of association in violation of the First and Fourteenth Amendments.

Defendants' seeks dismissal claiming Plaintiffs have failed to allege the Defendants' procedures were inadequate or that its conduct was not shocking to the conscience. This is patently false! Defendants intentionally failed to follow their own policies and practices and failed to count ALL the signatures submitted. While Defendants don't find this "shocking", it is unfathomable how the election board's not counting signatures could be any more shocking! How possibly could the COEB have

found the candidate's nomination petition insufficient if it had NOT counted all the signatures. How possibly could the COEB have found candidate's Rule 8 motion had been triggered when it had NOT finished counting all the signatures. How possibly could candidate have known the records examination was considered complete when NOT all the collected signatures had been counted? There is no way this treatment of not counting signatures is rational. The Illinois Election Code does not allow the disqualification of candidates when less than all signatures are counted! It is beyond rational. It is shocking that the COEB abjectly failed its most basic obligation – to count signatures and ballots! While the COEB procedures must survive a strict scrutiny analysis which is applied to these fundamental constitutional rights to equal protection and freedom of association, the procedures and policies of the COEB fail even a rational basis review.

Rooker-Feldman Doctrine is Inapplicable

The Rooker-Feldman doctrine prohibits district courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). The doctrine is NOT triggered simply by the entry of judgment in state court nor does it stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. *Id.* at 292-93. The Seventh Circuit has recognized the *Exxon Mobil* holding in *TruSery Corp. v. Flegles, Inc.*, 419 F.3d 584 (7th Cir. 2005) that the Rooker-Feldman doctrine does NOT prohibit a party from filing a claim in federal court before a state court renders a judgment on a pending

suit involving the same issues as long as the federal claim "present[s] some independent claim, albiet one that denies a legal conclusion that a state court has reached in a case to which he was a party. *Id.* at 59-91 (quoting *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726, 728 97th Cir. 1993)).

The Rooker-Feldman doctrine does not apply to the present case. First, Kowalski (not Plaintiffs) filed her claim in federal court after voluntarily dismissing her claims in state court. Second, Plaintiffs claim does NOT allege an injury caused by the state court decision, but rather an injury caused by the unconstitutional policies and procedures as applied by the Defendants. While the COEB's policies and procedures are facially valid and neutral, but as-applied these policies and procedures injured Plaintiffs and remove Plaintiffs' candidate from the ballot. This injury is caused by the COEB; not by the Illinois court.

RICO Claim

Defendants seek dismissal claiming the COEB as a governmental entity could not have formed a malicious intent for RICO liability. Even accepting that the Defendants cannot be held liable in their official capacities, however, Defendants' argument is not dispositive because Plaintiffs also pursue their claim against the Defendants as officers as well as members in their individual capacities. Plaintiffs, for example, assert that "Defendants, ORR, ALVAREZ and BROWN, received income directly or indirectly from their conduct on the ELECTORAL BOARD." In addition, public officials can be held individually liable for actions taken while holding public office and/or misuse of their public office. See, e.g., *United States v. Warner*, 498 F.3d 666, 696 (7th Cir.2007) (affirming RICO conviction of former Illinois governor based on activities while defendant was serving as Illinois Secretary of State and Governor); *United States v.*

Emond, 935 F.2d 1511, 1512 (7th Cir.1991) (affirming RICO conviction of village manager who "used his official position as Streamwood's village manager to extort money from persons with business before the village government."). The COEB may be an enterprise for the purposes of RICO. A municipality or other public entity may qualify as a RICO enterprise. See *Emond*, 935 F.2d at 1512 (finding Village of Streamwood to be RICO enterprise); see, e.g., *Warner*, 498 F.3d at 696 (State of Illinois was a RICO enterprise); *United States v. Balzano*, 916 F.2d 1273, 1290 (7th Cir.1990) (Chicago Fire Department was a RICO enterprise); *United States v. Murphy*, 768 F.2d 1518, 1531 (7th Cir.1985) (Circuit Court of Cook County was a RICO enterprise); *United States v. Lee Stoller Enters., Inc.*, 652 F.2d 1313, 1318-19 (7th Cir.1981) (sheriff's office was a RICO enterprise). Section § 1961(1)(B) enumerates the federal law violations that constitute "racketeering activity." Under § 1961(1)(B), for example, racketeering activity includes, among other crimes, mail and wire fraud, and obstruction of justice. See 18 U.S.C. § 1961(1)(B). To establish a "pattern" under RICO, Plaintiffs must prove at least two offenses, or predicate acts. *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 801-802 (7th Cir.2008) (citing *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 250, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)). Defendants are subject to RICO liability.

WHEREFORE, the Plaintiffs, JAN KOWALSKI and ZIFF SISTRUNK, respectfully requests that this Honorable Court:

A. Deny Defendants' Motion to Dismiss Plaintiffs' Amended Complaint; and

B. For such other and further relief as this Court deems just and equitable.

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