NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jan Kowalski and Ziff Sistrunk,	)	
	)	
Plaintiffs,	)	
	)	16 cv 1891
v.	)	Judge John W. Darrah
Cook County Officers Electoral Board, *et al.*,	)	
	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants, Cook County Officers' Electoral Board ("CCOEB"), David Orr, in his official capacity as Cook County Clerk ("Clerk Orr"), Anita Alvarez, in her official capacity as Cook County State's Attorney and Member, and Dorothy Brown, in her official capacity as Clerk of the Circuit Court of Cook County and Member, by their attorney ANITA ALVAREZ, State's Attorney of Cook County, through her assistant, Marie D. Spicuzza, hereby reply in support of Defendants' Motion to Dismiss Plaintiffs' ("Plaintiffs" or "Ms. Kowalski/Mr. Sistrunk") claims against Defendants.

INTRODUCTION

This case is a simple one: Plaintiff Kowalski wants now a fifth opportunity to argue a right to rehabilitate hundreds of petition signatures despite her own failure to follow the rules of the Cook County Officers Electoral Board ("CCOEB"), which provided her with the mechanism to do so. Plaintiff Kowalski personally sat through the registration records examination, received a copy of the final summary report of rulings made and signed it below the line reading "I acknowledge the completion of the records examination at 12/22/2015 6:27:06 PM." After the CCOEB ruled her name should not be printed on the ballot for the March 15, 2016 primary, she

filed her petition for judicial review of the CCOEB's decision with the Circuit Court. She lost and appealed – twice – and lost both appeals.

Ms. Kowalski needlessly complicates this matter, however, by bringing in Plaintiff Sistrunk, additional claims, and asserting claims already raised, ruled on and disposed of in state court, all of which are improper, unsupported by law, and for which she could not then and cannot now state a claim, much less meet the requirement of standing to bring them. Under governing law, Ms. Kowalski has no standing to bring her First and Fourteenth Amendment claims because she suffered no injury at the hands of the CCOEB. The law is equally clear that her claims are barred by *res judicata* and claim preclusion – she took many bites at the proverbial apple in state court. Additionally, the CCOEB and its members have immunity from the claims brought under the Eleventh Amendment and qualified immunity jurisprudence. Lastly, Plaintiffs' claims suffer from not stating a cause of action for violations of The Voting Rights Act of 1965, Fourteenth Amendment due process and the Racketeer Influenced Corrupt Organizations Act.

ARGUMENT

I. Plaintiffs Lack Standing to Bring First and Fourteenth Amendment Challenges to CCOEB Decision.

There are no set of facts consistent with the Complaint's allegations that could establish standing and Plaintiffs' Complaint should be dismissed. Plaintiffs assert 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." *Lac Du Flambeau of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005), Plaintiffs' Response at 5. However, Plaintiffs fail to satisfy all three elements to establish "the irreducible constitutional

minimum of standing" set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

First, the plaintiff must have suffered an injury in fact, which is the invasion of a legally protected interest that is concrete and particularized and actual or imminent. *Id.* at 560-61. The Illinois Appellate Court concluded that Plaintiffs have suffered no injury in case numbers 16-0217 and 16-0528. Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Any injury suffered by either of the Plaintiffs was caused by Ms. Kowalski's own actions in failing to timely file a challenge to the signature check "registration record examination," including the alleged 23 missing pages. (*See* Plaintiffs' Response at 1-2, 12.) Third, the alleged injury must be likely to be redressed by a favorable decision. *Id.* Plaintiffs have not alleged an injury and therefore are not entitled to their proposed remedy of being placed on the November 2016 ballot. (Plaintiffs' Response at 2.) Thus, Plaintiffs have no standing.

Further, Plaintiffs do not have standing under Section 2 of the Voting Rights Act of 1965. Mr. Sistrunk's rights were not violated under Section 2 of the Voting Rights Act of 1965. Mr. Sistrunk signed Ms. Kowalski's nominating petition. The CCOEB determined that Ms. Kowalski's nomination petition lacked a sufficient number of valid signatures. (Complaint at ¶ 31.) Subsequently, Ms. Kowalski failed to meet the deadline under CCOEB Rule 8 to contest the results of a petition signature check (Complaint at ¶¶ 35-37.) Since Ms. Kowalski missed the filing deadline to challenge the signature check, she forfeited her right to challenge the CCOEB decision, including the alleged missing 23 pages. Ms. Kowalski's failure to timely challenge the CCOEB decision did not deny Mr. Sistrunk, a minority voter, an opportunity to vote in the March 15 Primary. Mr. Sistrunk could not vote for Ms. Kowalski, however, that is not a cause of

action under Section 2 of the Voting Rights Act. There are no set of facts that could be plead that gives either Ms. Kowalski or Mr. Sistrunk standing under Section 2 of the Voting Rights Act because no voting procedure or practice resulted in a denial of or abridgement of the right to vote on account of race or color. 42 U.S.C.S. § 1973. Therefore, Plaintiffs' Complaint should be dismissed with prejudice.

A. Plaintiffs' Claims Are Barred By The Eleventh Amendment.

Plaintiffs' argument that the CCOEB and its Members are "not an Illinois board or Illinois officers" is incorrect. (Plaintiffs' Response at 6.) Plaintiffs' claims are barred by the Eleventh Amendment. Under Illinois law, the CCOEB and its members are state officials and, therefore, all of Plaintiffs' claims against the CCOEB and its Members in their official capacity are barred by the Eleventh Amendment. An Electoral Board is a creature of state statute and can exercise only those powers conferred upon it by the legislature. *Kozel v. **State** Board of Elections*, 126 Ill.2d 58, 68, 533 N.E.2d 796, 127 Ill. Dec. 714 (1988); 10 ILCS 5/10-9(2.5). The Election Code was enacted to carry out state election law and policy.

> Election laws exist to preserve the integrity of our government. [ ] ... the State's interest in regulating elections must be recognized. …[T]he State's legitimate interest in guarding the integrity of the electoral system has a rational relationship to the [electoral] board's removal of petitioner's name from the ballot.

Huskey v. Municipal Officers Electoral Board, 156 Ill.App.3d 201, 205 (1st Dist. 1987).

All of the CCOEB's Members, the Cook County Clerk, the Cook County State's Attorney and the Cook County Circuit Court Clerk are all members of the State government under the Illinois Constitution. *See* Il. Const. (1970) art. VII, Section 4(c) and art. VI, § 18; *Drury v. County of McLean*, 89 Ill. 2d 417, 420, 424 (Ill. 1982); *County of Kane v. Carlson*, 116 Ill. 2d 186, 200 (1987).

Clerk Orr, the Cook County State's Attorney and the Cook County Circuit Court Clerk

are independently elected county officers established under section 4(c) of article VII and sections 18 and 19 of article VI of the Illinois Constitution.

The various County officers established in article VII, section 4(c) and sections 18 and 19 of article VI are recognized by the courts as legally separate entities from the County itself. *See, e.g., Carver v. Sheriff of LaSalle County*, 203 Ill. 2d 497 (2003) (the Sheriff and not the county board is vested by law with "authority to make over-all policy decisions for the office of county sheriff," noting that "[s]heriffs, treasurers, clerks of court, and several other officers within Illinois counties are elected directly by the people and establish their own policies"); *Moy v. County of Cook*, 159 Ill. 2d 519 (1994) (County is given no authority to control the office of the sheriff; sheriff's statutory duties as custodian of county jail are independent of and unalterable by the County Board and thus the County could not be held vicariously liable for sheriff's alleged negligence in wrongful death action); *Greer v. Orr*, 2001 U.S. Dist. LEXIS 12404 (N.D. Ill. Aug. 15, 2001) (the County Clerk has a legal existence separate from that of Cook County and is a suable entity).

Consequently, suits against the CCOEB and its Members in their official capacity are barred by the Eleventh Amendment. *Farrar v. Glantz*, 2000 U.S. Dist. LEXIS 6499, ** 8-10 (N.D. Ill. May 10, 2000) (Norgle, J.) ("Because the Clerk of the Court is a member of state government and not the local government, Eleventh Amendment immunity is triggered.").

B. Plaintiffs' Claims are Barred by *Res Judicata* and Claim Preclusion Because the Identical Claims Were or Could Have Been Raised in State Court.

Both Ms. Kowalski and Mr. Sistrunk's claims are barred by *res judicata*. (Plaintiffs' Response at 7-8.) Ms. Kowalski's claims are barred by *res judicata* as "the doctrine of *res judicata* extends not only to every matter that was actually determined in the prior suit but to every other matter that might have been raised and determined in it." *Girot v. Municipal*

Officers Electoral Bd., 2006 U.S. Dist. LEXIS 1381 (N.D. Ill. 2006) (Plaintiff restored to ballot in state court barred by *res judicata* from subsequent § 1983 claim); *Torcasso v. Standard Outdoor Sales, Inc*., 157 Ill. 2d 484 (1993); *see also Aaron v. Mahl*, 550 F.3d 659, 664 (7th Cir. 2008) ("The doctrine of "*[r]es judicata* bars not only those issues actually decided in the prior suit, but all other issues which could have been brought.") The principle underlying *res judicata*—or claim preclusion—is to minimize "the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

Ms. Kowalski's claims in the instant lawsuit were raised in the Cook County Circuit Court and were voluntarily dismissed. As Ms. Kowalski could have amended her complaint after these counts were stricken and proceeded in state court, the doctrine of *res judicata* precludes her raising the identical claim in federal court. *Res judicata* prevents Plaintiffs from proceeding on the same claims in multiple lawsuits both in the instant lawsuit, previously in Cook County Circuit Court and the Illinois Appellate Court, and raises both forum shopping and the possibility of inconsistent decisions. *See Torcasso v. Standard Outdoor Sales, Inc*., 157 Ill. 2d 484 (1993); *see also Aaron v. Mahl*, 550 F.3d 659, 664 (7th Cir. 2008); *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

Contrary to Plaintiffs' assertions, claim preclusion applies to Ms. Kowalski and Mr. Sistrunk. Mr. Sistrunk is Ms. Kowalski's privy and, thus, Mr. Sistrunk is also barred by the doctrine of claim preclusion from re-litigating these same claims in federal court. (Plaintiffs' Response at 7-8.) "[T]he doctrine of claim preclusion 'provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action.'" *Rose v. Bd. of Election Comm'rs for*

the City of Chi., 815 F.3d 372, 374 (7th Cir. 2016); "For the doctrine of claim preclusion to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *Id*. The *Rose* case factually mirrors the instant case: the Plaintiff lost before the electoral board, went to court and lost again. The Seventh Circuit affirmed the dismissal of his complaint when he re-made it in federal court. Claim preclusion applies here and bars Plaintiffs from re-litigating this action because both Ms. Kowalski and Mr. Sistrunk are in privity and Ms. Kowalski filed and lost her cases in the Appellate Court, case numbers 16-0217 and 16-0528.

The Seventh Circuit has also explained how privity can extend to non-parties to a suit:

> While "privity is an elusive concept," it is generally applied to those with a sufficiently close identity of interests. *In re L&S Industries, Inc*., 989 F.2d 929, 932 (7th Cir. 1993). Thus, the preclusive effects of judgments have been expanded to apply to nonparties, *id*., and "res judicata can sometimes operate to bar the maintenance of an action by persons who . . . were not parties to the initial action." *Gonzalez v. Banco Central Corp.*, 27 F.3d 751 (1st Cir. 1994). "Under the doctrine of virtual representation, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *In re L&S Industries*, 989 F.2d at 933 (internal citations omitted).

People Who Care v. Rockford Bd. of Educ., 68 F.3d 172, 177 (7th Cir. 1995). In another case, the Seventh Circuit held that the City of Green Bay was the "virtual representative" of an individual officer:

> Under the doctrine of virtual representation, "'a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to his virtual representative.'" *In the Matter of L & S Industries, Inc.*, 989 F.2d 929, 933 (7th Cir. 1993), quoting *Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177 (7th Cir. 1987).

Monfils v. Taylor, 165 F.3d 511, 521 (7th Cir. 1998). Thus, the Seventh Circuit continues to

apply the concept of virtual representation where appropriate.

The effect of a judgment in subsequent litigation is determined by the law of the jurisdiction that rendered the judgment – here, Illinois law. *In re Catt*, 368 F.3d 789, 790-791 (7th Cir. 2004). In *Ill. Non-Profit Risk Mgmt. Ass'n v. Human Serv. Ctr.*, 378 Ill. App. 3d 713, 721 (4th Dist. 2008), an Illinois Appellate Court used the concept of virtual representation to hold that some members of an insurance pool were precluded from bringing suit because other members had already done so. The reasons the Court gave for disallowing the action are relevant here:

> The interests of all the pool members are identical because any amounts levied against one pool member necessarily affect the amounts other members are required to pay. Allowing the pool members to repeatedly litigate this fiduciary-duty claim would not promote the interests of judicial economy. Further, repetitive litigation runs the risk of inconsistent judgments. Accordingly, the pool members' claim against RMA and Murray for breach of fiduciary duty is barred by *res judicata*.

Here, the interests of Ms. Kowalski and Mr. Sistrunk are the same – both are claiming injury from the result of the CCOEB signature check/registration record exam. Allowing these litigants to repeatedly litigate this claim does not promote the interests of judicial economy. Further, repetitive litigation runs the risk of inconsistent judgments. This Court, therefore, should not allow Ms. Kowalski's privy, Mr. Sistrunk, to file this action as a way of forum shopping and, moreover, to circumvent the appellate process which Ms. Kowalski pursued and lost.

II. Defendants are Entitled to Qualified Immunity With Respect to the CCOEB Decision.

As argued in more detail below and incorporated herein, the CCOEB did not violate Plaintiffs' First and Fourteenth Amendment rights because Plaintiffs were not denied free speech, due process, equal protection or freedom of association by the CCOEB as Plaintiffs had

a right to appeal the alleged failure to count 23 pages of the nomination petition and did not timely file an appeal. (Plaintiffs' Response at 9-11.) Plaintiffs cannot plead any set of facts to show that their First or Fourteenth Amendment rights were violated. Therefore, the CCOEB and its Members are entitled to qualified immunity for such actions.

III. Plaintiffs Fail to State a Claim for Relief.

Plaintiffs' Complaint does not present a plausible case that the CCOEB violated 42 U.S.C. §§ 1983 and 1985, the Voting Rights Act of 1965 or RICO.

A. Plaintiffs have failed to show a valid due process right was violated.

While Plaintiffs assert that the CCOEB's alleged failure to count all the signatures is shocking, or that the Rule 8 deadline was not triggered by the alleged failure to count the signatures, it is clear that the CCOEB had procedures in place to challenge the registration records examination, procedures that Ms. Kowalski did not follow. (Plaintiffs' Response at 11-12.). Ms. Kowalski failed to meet the filing deadlines imposed on all parties before the CCOEB. Plaintiff twice attempted to convince the Hearing Officer that her lateness should be excused, but she could not produce a legally-cognizable basis for him to do so. Merely enforcing a neutral, universally-applied procedural rule does not rise to the level of a §1983 violation. Therefore, the CCOEB's conduct does not shock the conscience, and Plaintiffs have failed to state a substantive due process violation, and the substantive due process claim should be dismissed.

B. Plaintiffs' RICO Claim Fails As A Matter Of Law.

While Plaintiffs cite numerous cases wherein a public official misused their office, there are no such allegations in Plaintiffs' Complaint. (Plaintiffs' Response at 13-14.) Plaintiffs have failed to plead facts sufficient to state a claim under RICO. Here, Plaintiffs allege that the CCOEB and its Members engaged in a pattern of racketeering activity by repeated violations of

the Voting Rights Act of 1965, Sections 1983 and 1985 and the first, eighth, fourteenth and fifteenth amendments to U.S. and Illinois Constitutions. (Complaint at ¶ 78.) As argued above and in Defendants' Motion to Dismiss, there are no facts alleged that support any of the above violations and therefore, for all the above reasons, Plaintiffs have also failed to state a RICO claim. Additionally, Plaintiffs' purported RICO claim fails as a matter of law.

CONCLUSION

For all of the above-stated reasons, the Cook County Officers' Electoral Board, Clerk Orr, Anita Alvarez and Dorothy Brown respectfully request that this Court dismiss Plaintiffs' claims with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and grant any other relief it deems necessary and just.

Respectfully submitted,

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