UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to the Court's Order dated May 5, 2009, Defendant Federal Election Commission ("Commission") respectfully submits this supplemental memorandum in support of its motion to dismiss Plaintiffs' amended complaint.

I. Steele's Claims are Barred by *Res Judicata*

Although Plaintiff Michael Steele was not personally a party to *McConnell v. FEC*, 540 U.S. 93 (2003), the doctrine of *res judicata* prohibits his relitigation of that case. Plaintiffs' original complaint alleged that "Robert M. (Mike) Duncan is . . . the [Republican National Committee] Chairman, in which capacity he is RNC's chief executive officer." (Compl. ¶ 14.) As the Commission explained in its motion to dismiss that complaint, Duncan's claims — of which only one was a claim in his own right independent of the RNC — were precluded by *res judicata* because Duncan had asserted and lost the same claims in his capacity as an RNC officer in *McConnell*. (*See* Def. FEC's Mem. in Support of Mot. to Dismiss (Docket No. 20).) After the Commission filed its motion to dismiss, Michael Steele was elected Chairman of the RNC, and Plaintiffs moved to amend their complaint for "[t]he sole purpose of . . . substitut[ing] Michael

Steele for Robert 'M' Duncan" in "his official capacity of the RNC Chairman." (Pls.' Mot. for Leave to File Amended Compl. (Docket No. 51) at 1-2.) The Court granted Plaintiffs' motion to amend on May 5, 2009.

Res judicata, including both claim preclusion and issue preclusion, "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 (1979). Precluding relitigation "protects . . . adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54; *see also Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004) (quoting *Montana*); *Safadi v. Novak*, 574 F. Supp. 2d 52, 55 (D.D.C. 2008) (same). Thus, "a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action," *Apotex*, 393 F.3d at 217, and any issues that were "actually and necessarily" decided in the earlier case cannot be relitigated. *See Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (citing *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)).

As a general matter, because each person has a right to litigate his own cause of action, a plaintiff who was not a party to a prior lawsuit usually is not subject to preclusion arising from that earlier suit. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008). There are, however, substantial exceptions to this general rule — situations in which the plaintiff is bound by the first case, despite his not technically being a party to it. *See id*. at 2172. The Supreme Court recently set out a "framework" describing six established categories of nonparty preclusion, including situations in which (1) there is a "pre-existing substantive legal relationship[ ] between the person to be bound and a party to the judgment . . . . includ[ing], but . . . not limited to, preceding

and succeeding owners of property"; (2) the new plaintiff "was adequately represented by someone with the same interests who [wa]s a party to the suit"; and (3) "a nonparty . . . brings suit as an agent for a party who is bound by a judgment." *See id*. at 2172-73 (internal citations and quotation marks omitted).

Applying *res judicata* to Steele — a nongovernmental officer purporting to sue in the same "official" capacity as a prior plaintiff — is consistent with the categories of nonparty preclusion noted in *Taylor*. First, to the extent Steele claims an interest in conducting the solicitations that are the subject of this litigation, his position is that of a successor-in-interest, i.e., he is the successor to Duncan's claim regarding the RNC's nonfederal fundraising solicitations. (*See* Pls.' Mot for Leave to File Am. Compl. at 1 ("Steele's position is the same as Duncan's.").) Steele is therefore precluded from relitigating Duncan's failed lawsuit on that matter. *See Am. Forest Council v. Shea*, 172 F. Supp. 2d 24, 27 (D.D.C. 2001) (holding that plaintiff was "clearly barred by *res judicata* in this action, being a direct successor-in-interest to an actual participant" in prior action against government agency). Second, to the extent Steele brings this suit as an "official capacity" claim as an RNC officer and relies upon the principles applicable to substituting successor government officials (*see* Pls.' Mot for Leave to File Am. Compl. at 2 ("Just as successors in public office are automatically substituted, . . . Steele should be allowed to replace Duncan in his official capacity of the RNC Chairman . . . .")), Duncan already litigated that "official" claim in *McConnell*, and so Steele is subject to the same preclusion that would prohibit any other official from escaping a judgment imposed on his predecessor in office.[1] *See* 18A Wright, Miller & Cooper, *Federal Practice & Procedure* § 4458

[1] Indeed, Steele can only bring an official-capacity claim because the fundraising restriction only applies to him when he is acting "on behalf of" the RNC. 2 U.S.C. § 441i(a)(2).

nn. 15-16 (2d ed. 2002) ("[S]uccessors in office are bound to judgments against their predecessors.") (citing *New Orleans v. Citizens' Bank of La.*, 167 U.S. 371, 389 (1897) ("The mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged.")); Restatement (Second) of Judgments § 36 cmt. e (1982 & Supp. 2008) (noting that suit involving government officer in official capacity is "binding on the governmental body of which he is an official and on his successors in office"). Finally, because Steele's claims regarding solicitation of soft money are simply derivative of the RNC's claims regarding raising and spending soft money, he is precluded from relitigating *McConnell* as "an agent for a party who is bound by a judgment," i.e., the RNC. *See Taylor*, 128 S. Ct. at 2173 (citing 18A Wright, Miller, and Cooper, *Federal Practice & Procedure* § 4449); *cf.* Restatement (Second) of Judgments § 59(2) (1982 & Supp. 2008) ("The judgment in an action to which the corporation is a party is binding under the rules of res judicata in a subsequent action by [individuals] suing derivatively in behalf of the corporation . . . .").

The practical effect that would arise from permitting Steele to proceed in this case demonstrates why he must be subject to preclusion: If each successive Chairman of the RNC has the right to litigate his own constitutional action against BCRA, the instant lawsuit would not bind Steele's successors. In other words, even if the Commission were to prevail on the merits of this case, each successive RNC Chairman would be able to relitigate the cause of action yet again, claiming his or her own "as-applied" constitutional exemption from BCRA. Conversely, under Steele's rationale of non-preclusion, if Steele were to prevail in this action, the Commission would nonetheless be able to prohibit the RNC's next Chairman from soliciting soft

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See McConnell, 540 U.S. at 157 ("[O]fficers of national parties are free to solicit soft money in their individual capacities. . . .").

money, as the Court's ruling would be effective only as to Steele himself. Such results would be directly contrary to the finality and reliance interests underlying *res judicata*.

The Supreme Court upheld BCRA Title I and ruled against Duncan in *McConnell*. For that holding to constitute a "conclusive resolution," *Montana*, 440 U.S. at 153, it must bind Duncan's successor.

II. Steele's Claim Fails as a Matter of Law Under *McConnell*

Even if *res judicata* did not preclude this action, Steele's claim, like all of the others in this case, fails as a matter of law because *McConnell* held that BCRA Title I is narrowly tailored to the government's interest in preventing actual and apparent corruption, regardless of the activities that would be funded with soft money if it were permitted. (*See* Def. FEC's Mem. in Support of Mot. to Dismiss at 28-29.) Steele's cause of action, which seeks the ability to raise soft money only for certain purposes, does not state a claim under that constitutional standard.

III. Conclusion

For the foregoing reasons, the Commission respectfully requests that the Court dismiss the Amended Complaint for failure to state a claim on which relief can be granted.

Respectfully submitted,

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