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.	)	OPPOSITION TO MOTION TO AMEND COMPLAINT

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Defendant Federal Election Commission ("Commission") hereby opposes Plaintiffs' Motion for Leave to File Amended Complaint ("Mot. to Amend") (Docket No. 51). Plaintiffs' motion should be denied because Plaintiffs delayed two months in seeking leave to amend, during which time the Commission conducted discovery and briefed three pending, dispositive motions predicated on the original complaint. To permit Plaintiffs to amend at this late stage would prejudice the Commission by foreclosing any opportunity for Defendants to conduct discovery into the allegations and assertions of the proposed new Plaintiff and to incorporate such discovery into the factual record upon which the Court will decide this case.

I. PROCEDURAL HISTORY

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.) On January 26, 2009, the Commission filed a motion to dismiss the complaint; that motion was based, in part, on Duncan's having been a plaintiff in *McConnell v. FEC*, 540 U.S. 93 (2003), and therefore precluded by *res judicata* from bringing this action.

(*See* Def. FEC's Mot. to Dismiss (Docket No. 20).) On the same day, Duncan and the other Plaintiffs filed a motion for summary judgment. (Docket No. 21.)

Later that week, on January 30, Michael Steele was elected Chairman of the RNC (Mot. to Amend at 1), and Duncan's term as Chairman accordingly ended. The Commission commenced discovery in early February and — having heard nothing from Plaintiffs regarding the change in Duncan's status — noticed under Fed. R. Civ. P. 30(b)(6) the depositions of three of the four Plaintiffs: The RNC, the California Republican Party, and the Republican Party of San Diego County. Because Duncan was no longer Chairman of the RNC, deposing him became less important, given that any testimony he might have provided regarding the future activities of the RNC would have been speculative. Furthermore, the Commission was already in possession of sworn testimony by Duncan regarding the activities at issue in this case — i.e., his declaration in the *McConnell* action. As to Steele, he could not have provided competent testimony as to Duncan's individual allegations. Although Steele's deposition might have provided relevant evidence regarding the RNC's claims, he was not a plaintiff, and he had provided no testimony regarding the RNC's proposed future activities or its proposed self-imposed restrictions regarding interactions with federal candidates and officeholders. Thus, the Commission made the conscious determination, *based on Steele's not being a plaintiff and not having testified* in support of the RNC's factual allegations, not to direct discovery specifically at Steele. In addition to his apparent decision to not participate in the case diminishing the probative value of his testimony, the Commission was sensitive to the fact that he had just been elected as a leader of one of the two major American political parties, which had obvious practical ramifications on the demands on his time.

The Commission deposed the three organizational Plaintiffs in late February and early March and filed its opposition to Plaintiffs' summary judgment motion on March 9 (Docket No. 39). In their oppositions, Defendants relied on the fact that Plaintiff-affiant Duncan was no longer the Chairman of the RNC. (*See* Def. FEC's Statement of Genuine Issues ¶¶ 4, 27-31 (Docket No. 39); Van Hollen Mem. of P. & A. in Opp. to Pls.' Mot. for S.J. at 36-37 (Docket No. 41).) On March 30 — two full months after Steele was elected RNC Chairman — Plaintiffs filed their motion for leave to amend the complaint. On the same day, Plaintiffs informed Defendants that Plaintiffs would not respond substantively to Intervenors' discovery requests (which had been served on February 23) and, in fact, would not permit *any* discovery to go forward until the Court ruled on Plaintiffs' motion for summary judgment and the Commission's motion to dismiss. Plaintiffs thereby unilaterally ruled out the possibility of further discovery on Steele, despite simultaneously seeking to add him to this case as a plaintiff.

II. STANDARD OF REVIEW

After a response to a pleading has been filed, the pleading may be amended only by consent of the parties or with "the court's leave." Fed. R. Civ. P. 15(a)(2).[1] Although "[t]he court should freely give leave when justice so requires," *id*., "[i]t is within the sound discretion of the district court to decide whether to grant such leave." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc*., 810 F.2d 243, 247 (D.C. Cir. 1987). Leave should not be granted if "undue delay . . . on the part of the movant" causes "undue prejudice to the opposing party." *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir.

[1] Plaintiffs' motion also refers to Fed. R. Civ. P. 25(d). (Mot. to Amend at 2.) That rule, however, applies only to "public officers," and research discloses no authority for applying it to any non-governmental party. *Cf*. Fed. R. Civ. P. 25(d) Advisory Committee Note to 1961 Amendment (explaining that rule applies to cases "brought by public officers *for the government*") (emphasis added).

1996) (quoting *Forman*); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971) ("[I]n deciding whether to permit . . . amendment, the trial court was required to take into account any prejudice that [the non-movant] would have suffered as a result . . . ."); *see generally* 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1488 n.15 (2d ed. Supp. 2009) ("[A]n amendment clearly will not be allowed when the moving party has been guilty of delay in requesting leave to amend and, as a result of the delay, the proposed amendment, if permitted, would have the effect of prejudicing another party to the action.").

A party's delay in moving to amend is "undue" when, despite learning of the facts underlying the proposed amendment during the discovery period, the movant waits until after the close of discovery to seek amendment. *See Hollinger-Haye v. Harrison Western/Franki-Denys*, 130 F.R.D. 1, 1-2 (D.D.C. 1990) (denying leave to amend where facts on which amendment was based were "known to the plaintiff prior to the completion of discovery"); *Anderson v. USAir, Inc.*, 619 F. Supp. 1191, 1198 (D.D.C. 1985), *aff'd* 818 F.2d 49, 57 (D.C. Cir. 1987) (denying leave to amend where, in a case litigated "with unusual speed," plaintiff moved to amend complaint after close of three-month discovery period, simultaneously with parties' cross-motions for summary judgment). The non-movant is unduly prejudiced by such a delay when the amendment results in "denial 'of the opportunity to present facts or evidence which would have been offered had the amendment been timely.'" *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 6 (D.D.C. 2008) (internal brackets omitted) (quoting *Dove v. Wash. Metro. Area Transit Auth.*, 221 F.R.D. 246, 248 (D.D.C. 2004)); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. No. 82-220, 1988 WL 122568, at *4 (D.D.C. Nov. 8, 1988), *aff'd* 905 F.2d 438 (D.C. Cir. 1990) (holding that motion should be denied if non-movant demonstrates

"that at this stage of the litigation they are prevented in some way from asserting [a] response to the amendment that they otherwise would have used had the amendment been timely."). Thus, the non-movant is unduly prejudiced by an amendment that justifies the non-movant's desire to conduct additional discovery but that is made after the close of the discovery period. *See Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996) (affirming district court's denial of leave to amend); *see also Williamsburg*, 810 F.3d at 247 (affirming denial of leave to amend where plaintiff's motion was untimely and would have required additional discovery); *Hollinger-Haye*, 130 F.R.D. at 2.

III. ARGUMENT

Plaintiffs' motion to amend the complaint is untimely: It is predicated on facts known to Plaintiffs throughout discovery, yet Plaintiffs did not move to amend until after the parties' initial summary judgment papers had been filed. Because Plaintiffs did not timely move to amend, Defendants' briefs included a number of arguments regarding the significance of Duncan's changed status. The Commission, for example, noted that Duncan's term had expired and that he has "no authority, beyond that of any other RNC member, over the actions or decisions of the current RNC Chairman." (FEC SGI ¶ 4.) Similarly, Representative Van Hollen pointed out that "former officers of a political party have no authority to bind current officers of the party or to execute any plans that current officers may have." (Van Hollen Mem. of P. & A. in Opp. to Pls.' Mot. for S.J. at 37 (Docket No. 41).) In light of this manifest reliance on Steele's non-participation in this case throughout discovery and briefing, Plaintiffs' amendment also would prejudice — indeed, it would foreclose — the Commission's ability to develop an

evidentiary record regarding Steele's claims.[2] Under the caselaw discussed above, Plaintiffs' undue delay prejudiced Defendants and such prejudice warrants denial of Plaintiffs' motion.

If the Court were nonetheless to grant Plaintiffs' motion and Steele were to become a Plaintiff, the Commission should be permitted to conduct additional discovery directed to Steele, including a deposition, and submit to the Court any relevant material arising from that discovery, as well as related legal briefing. In addition, amending the complaint would necessitate a re-briefing of the Commission's motion to dismiss, at least as to Steele. *See* Fed. R. Civ. P. 15(a)(3). It is, therefore, extremely unlikely that briefing on the Commission's new motion to dismiss (including response and reply briefs) would be complete before the oral argument scheduled for April 29, 2009 — a consequence arising solely from Plaintiffs' dilatory conduct with regard to amending their complaint.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for leave to file an amended complaint should be denied. In the alternative, the Commission should be given a reasonable opportunity to (a) file a motion to dismiss the amended complaint, (b) conduct discovery on Chairman Steele, and (c) file a supplemental summary judgment brief based on the new discovery and, should the Court require it, argue the revised motion to dismiss and supplemented summary judgment motion to the Court.

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

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[2] During discovery, the RNC testified that Steele, if he were to provide testimony in this case, would concur with his predecessor's factual assertions and allegations. (*See* Josefiak Dep. 209:14-210:5.) Such a statement by the RNC's 30(b)(6) representative about a non-party's hypothetical testimony is, of course, no substitute for the opportunity to question the new Plaintiff directly.

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Dated: April 13, 2009

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[PROPOSED] ORDER

This matter having come before the Court upon Plaintiffs' Motion for Leave to File Amended Complaint and Defendant Federal Election Commission's opposition thereto, it is hereby

[ORDERED that Plaintiffs' motion is DENIED.]

[ORDERED that Plaintiffs' motion is GRANTED, and furthermore that:

1. The Commission shall be permitted to conduct discovery related to Plaintiff Steele for no more than thirty days after the date of this Order;

2. Plaintiffs shall respond to any written discovery served within ten calendar days;

3. (a) The FEC shall file a supplemental memorandum of points and authorities regarding summary judgment based any additional discovery no later than fifty days after the date of this order;

(b) Plaintiffs shall file a response to the Commission's supplemental memorandum no later than fourteen days after that brief is filed;

4. (a) The Commission shall file a motion to dismiss the amended complaint within the time provided by Fed. R. Civ. P. 15(a)(3);

(b) Plaintiffs shall file an opposition to the Commission's motion to dismiss the amended complaint no later than fourteen days after that motion is filed;

(c) The Commission shall file its reply brief no more than seven days after Plaintiffs file their opposition brief.]

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BRETT M. KAVANAUGH
United States Circuit Judge

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RICHARD J. LEON
United States District Judge

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ROSEMARY M. COLLYER
United States District Judge

Dated: _____, 2009