

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA, RISE, INC.,
DETROIT/DOWNRIVER CHAPTER
OF THE A. PHILIP RANDOLPH
INSTITUTE,

No. 19-13341

Plaintiffs,

HON. STEPHANIE DAWKINS
DAVIS

v

MAG. R. STEVEN WHALEN

DANA NESSEL, in her official
capacity as the ATTORNEY
GENERAL OF THE STATE OF
MICHIGAN,

Defendant.

Sarah S. Prescott (P70510)
Attorney for Plaintiffs
105 East Main Street
Northville, Michigan 48168
248.679.8711

Kevin J. Hamilton
Attorney for Plaintiffs
1201 Third Ave, Suite 4900
Seattle, Washington 98101
206.359.9741

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Marc E. Elias
Attorney for Plaintiffs
607 Fourteenth St, NW
Washington, DC 20005
202.628.6600

**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO
CONSOLIDATE**

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether consolidation should be denied where the new action is identical to the instant case, was filed after the Plaintiffs had already amended their complaint, and serves no legitimate purpose?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Fed. R. Civ. Proc. 42

STATEMENT OF FACTS

This case was originally filed by Plaintiff Priorities USA on November 12, 2019, and it alleged constitutional violations concerning two separate statutes. (R.1, Cmplt, PageID #1-18). On December 4, 2019, the Court entered a stipulated order granting a two-week extension for Defendant Michigan Attorney General Dana Nessel to respond to the complaint. (R.6, Stip. Dec. 5 Order, PageID #25-26). On December 20, Attorney General Nessel filed a motion to dismiss on grounds that Priorities USA lacked standing because it lacked an injury-in-fact, and also that the complaint failed to demonstrate that the statutes violated any constitutional rights.

On December 23, 2019, this Court entered an order *sua sponte* in which the Court essentially invited Priorities USA to amend its complaint within 21 days if doing so would address the issues raised in the motion to dismiss. (R.13, Dec. 23 Order, PageID #81-82). On January 9, 2020, the Court entered a stipulated order granting Priorities USA a two-week extension, making their response or amended complaint due on January 24, 2020. (R.15, Jan. 9 Order, PageID #84-85).

On January 23, 2020, the parties stipulated to another extension for Priorities USA to respond to the motion to dismiss or file an amended complaint, which was entered by the Court on January 27. (R.16, Jan. 27 Order, PageID #86-87). The order granted two additional business days, making the deadline January 28, 2020.

On the morning of January 27, 2020, Priorities USA's counsel sought concurrence in a motion to consolidate an as-yet-unfiled new complaint with this case. (Ex. A, 1/27/2020 e-mail). Counsel did not provide a copy of the proposed new civil action. (Ex. A). In response, Defense counsel questioned the need for a second lawsuit. (Ex. A.). Plaintiffs' counsel did not provide a copy of the proposed new action or offer any explanation for the necessity of filing a new, identical complaint, instead thanked defense counsel for their "input." (Ex. A).

Priorities USA filed an amended complaint on January 27, 2020, which added two new plaintiffs—Rise, Inc. and the Detroit/Downriver Chapter of the A. Philip Randolph Institute (DAPRI)—new allegations (increasing from 39 to 97 paragraphs), and four new legal claims. (R.17, Am. Cmplt, PageID #88-128). On the same day, the identical plaintiffs (Priorities USA, Rise, Inc., and DAPRI) filed a separate complaint

against the same defendant, Attorney General Nessel, raising identical allegations and identical legal claims (E.D. Mich Case No. 2:20-cv-10211, *Priorities USA v. Nessel*). Plaintiffs immediately moved to consolidate the new lawsuit with this case. (R.20, Motion to Consolidate, PageID #131-134). Plaintiffs continue to offer no explanation for the redundant pleading other than a vague reference to doing so “out of an abundance of caution to ensure that new allegations were considered in the court’s assessment of standing.” (R.20, PageID #132).

ARGUMENT

I. Fed. R. Civ. Proc. 42 does not permit consolidation of redundant actions that create unnecessary cost and delay.

Plaintiffs cite to Fed. R. Civ. P. 42(a) and argue that consolidation is allowed if two actions “involve a common question of law or fact.” (R.20, PageID #132). But Plaintiffs’ recitation of the Rule is incomplete, and Rule 42 merely permits consolidation while also allowing Courts to enter orders to avoid costs and delays:

If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders **to avoid unnecessary cost or delay.**

(Emphasis added). Far from avoiding unnecessary costs or delays, the filing of an identical complaint can only add confusion, duplication, and costs to this litigation.

It is entirely unclear what purpose the second lawsuit could possibly serve, and it seems like a solution in search of a problem. For their part, Plaintiffs state only that it was filed “out of an abundance of caution to ensure that new allegations were considered in the court’s assessment of standing.” (R.20, PageID #132). But caution about what? It is unclear what risk would prompt the need to file the same complaint twice.

Indeed, the Court had already invited an amended complaint to address the standing issues raised in the Attorney General’s motion to dismiss. There has been no indication that the Court would not consider Plaintiffs’ amended complaint. Regardless, if there were some defect in the amended complaint that would prevent the Court from considering the allegations, the same defect would be present in this identical separate complaint (filed with the Court on the same day as

the amended complaint) and would thus be subject to dismissal on the same grounds. Filing the same complaint twice would do nothing to force the Court's attention to any issues.

Moreover, consolidation of the duplicative filing would not be without consequence to the Court and Attorney General Nessel. Procedurally, consolidated cases are listed together in the caption, increasing the length of every pleading and filing with the Court. (See e.g. WD-Mich 1:19-cv-00614; 1:19-cv-00669). Also, notices would have to be sent in both the original and consolidated cases. *Id.* Consolidation of an identical complaint adds confusion and duplication to the Court's file—and the parties files—while providing absolutely no benefit to anyone.

Further, there are also unnecessary costs associated with consolidation in this circumstance. It should not escape the Court's attention that the Plaintiffs' claims are based on 42 U.S.C. § 1983, which—as the Court is aware—provides for the award of attorney fees to a prevailing party. Should Plaintiffs prevail, they may seek the costs of filing the second complaint, filing this motion, and all the subsequent

consolidation-related expenses. Rule 42 was clearly not intended as a vehicle for parties to multiply their billable costs.

Last, Fed. R. Civ. P. 11(b)(2) provides that by filing a pleading with the court, an attorney certifies that, “it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the costs of litigation.” There is no apparent legitimate purpose for simultaneously filing an amended complaint **and** an identical complaint with the same parties and claims as a separate action. Plaintiffs—despite a direct request—have offered no substantive explanation for this course of action. So it is fair to question Plaintiffs’ purpose. The plain effect of Plaintiffs’ duplicative filing would be to cause delay and increase costs while doing nothing to assist either the Court or the parties. Rule 42 should not be read to permit the consolidation of a complaint that appears to be in conflict with Rule 11.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendant Attorney General Dana Nessel respectfully requests that this Honorable Court deny Plaintiffs’ motion to consolidate and enter an order directing that the duplicative

complaint be dismissed, together with any other relief that the Court determines to be appropriate, including an award of costs and fees incurred in having to respond to this needless motion.

Respectfully submitted,

s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
P55439

Dated: February 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

s/Heather S. Meingast
Heather S. Meingast (P55439)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
P55439