

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES L. SHERLEY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:09-cv-01575-RCL
)	
KATHLEEN SEBELIUS, in her official)	
capacity as Secretary of the Department of)	
Health and Human Services, et al.,)	
)	
Defendants.)	

**DEFENDANTS’ OBJECTION TO
PLAINTIFFS’ RELATED CASE DESIGNATION**

The defendants respectfully submit their objection to the Notice of Designation of Related Civil Cases (Dkt No. 2) submitted by the plaintiffs in this action. The plaintiffs assert that this case is related to a previously-dismissed case, *Nightlight Christian Adoptions, et al. v. Thompson, et al.*, D.D.C. No. 01-cv-00502. The two cases are not related, as they involve neither the same parties nor the same subject matter.

The defendants, of course, would have no objection if this case were to be assigned again to this Judge, or to any other Judge of this Court, through the random assignment process. However, in light of the apparently erroneous nature of the plaintiffs’ designation, the defendants believe they are obligated to present this objection out of respect for the Court’s case-assignment process.

BACKGROUND

In the previously-dismissed action, nine plaintiffs – Nightlight Christian Adoptions (Nightlight), the Christian Medical Association (CMA), and seven individuals who are not

parties to the present action¹ – filed suit against the Department of Health and Human Services (HHS), the National Institutes of Health (NIH), and the heads of both agencies. Complaint (Dkt No. 1), *Nightlight Christian Adoptions, et al. v. Thompson, et al.*, No. 01-cv-00502 (D.D.C. filed Mar. 8, 2001). The complaint challenged the legality of guidelines that NIH had issued the previous year after notice-and-comment regarding federal funding for human embryonic stem cell (hESC) research, 65 Fed. Reg. 51,976 (Aug. 25, 2000). *Id.* NIH later withdrew those guidelines. 66 Fed. Reg. 57,107 (Nov. 14, 2001). In light of that withdrawal, the plaintiffs voluntarily dismissed their complaint without prejudice. Notice of Dismissal (Dkt No. 12), *Nightlight Christian Adoptions, et al. v. Thompson, et al.*, No. 01-cv-00502 (D.D.C. filed Jan. 14, 2002).

In the present action, Nightlight, CMA, and six individuals who were not parties to the previous action² filed suit against HHS, NIH, and the heads of both agencies. Complaint, Dkt No. 1. The complaint challenges the legality of a different set of guidelines that NIH published, after again providing notice and comment, to implement Executive Order No. 13,505 and to set standards for federal funding for hESC research, 74 Fed. Reg. 32,170 (July 7, 2009). *Id.*

DISCUSSION

The default rule in this district is that civil cases “shall be assigned to judges of this court selected at random” in the manner specified in the local rules. L.R. 40.3(a). This rule

¹ The seven additional plaintiffs were David A. Prentice, James P. Brinkman, Donielle D. Brinkman, Peter E. Murray, Suzanne M. Murray, Bruce L. Sturch, and Susan E. Sturch.

² The additional plaintiffs are James L. Sherley, Theresa Deisher, Shayne and Tina Nelson, and William and Patricia Flynn. The complaint also purports to name “Plaintiff Embryos” as an additional party.

“guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping.” *Tripp v. Executive Office of the President*, 196 F.R.D. 201, 202 (D.D.C. 2000). “The fundamental rationale for the general rule requiring random assignment of cases is to ensure greater public confidence in the integrity of the judicial process.” *Dale v. Executive Office of the President*, 121 F. Supp. 2d 35, 37 (D.D.C. 2000).

The local rules provide a limited exception to the random assignment rule for related cases. Two cases are related, *inter alia*, “where a case is dismissed, with prejudice or without, and a second case is filed involving the same parties and relating to the same subject matter.” L.R. 40.5(a)(4). This rule “has been interpreted strictly; a subsequent case may be ‘related’ only where it involves the same subject matter as the original case and is filed by ‘identical parties, not parties in interest.’” *Judicial Watch, Inc. v. Rossotti*, 2002 WL 31100839, at *1 (D.D.C. Aug. 2, 2002) (Lamberth, J.) (quoting *Thomas v. Nat'l Football League Players Assoc.*, 1992 WL 43121 (D.D.C. Feb. 18, 1992)).

The 2001 lawsuit and the present suit are not related cases under L.R. 40.5(a)(4). They do not involve the same parties. Seven plaintiffs in the prior litigation are not participating in the current suit, and six of the current plaintiffs did not participate in the prior suit. Rule 40.5(a)(4) requires a complete identity of all of the parties in both suits, however. *See Judicial Watch*, 2002 WL 31100839, at *1 (reassigning case where parties overlapped, but were not identical); *see also Stanford v. Potomac Elec. Power Co.*, 394 F. Supp. 2d 81, 84 n.3 (D.D.C. 2005). Nor do the two suits involve the same subject matter. Instead, the 2001 suit challenged one set of guidelines that have since been withdrawn, while the present suit challenges a new set of guidelines that were

issued in 2009, seven years after the dismissal of the previous action. *Compare Collins v. PBGC*, 126 F.R.D. 3, 8 (D.D.C. 1989) (under prior local rule, cases relate to the “same subject matter” where they both involved a determination of rights under the same pension plan). The plaintiffs’ designation thus fails both elements of Rule 40.5(a)(4).

The defendants are filing this objection in advance of the filing of their “first responsive pleading or motion” in response to the complaint in this action. L.R. 40.5(b)(2). The defendants, however, have previously filed the parties’ joint motion to set a briefing schedule for the plaintiffs’ preliminary injunction motion. (Dkt No. 8.)³ Counsel for the defendants apologize to the Court for any inconvenience they might have caused by not presenting this objection sooner. At the time of the previous filing, counsel had not yet reviewed the records of the previously-filed case, and thus did not until recently recognize the deficiencies in the plaintiffs’ designation.

³ The defendants also, by a separate filing, are asking the Court today for leave to file an overlength brief in support of their intended motion to dismiss the complaint and in opposition to the preliminary injunction motion.

CONCLUSION

For the reasons stated above, the defendants' objection to the plaintiffs' related case designation should be sustained, and this case should be transferred to the Calender and Case Management Committee for random assignment pursuant to Local Rule 40.5(c).

Dated: September 11, 2009

Respectfully submitted,

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