

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MARILYN VANN, RONALD MOON,
DONALD MOON, CHARLENE WHITE,
RALPH THREAT, FAITH RUSSELL,
ANGELA SANDERS, SAMUEL E. FORD,
and THE FREEDMEN BAND OF THE
CHEROKEE NATION OF OKLAHOMA,**

Plaintiffs,

v.

**KEN SALAZAR, Secretary of the United
States Department of the Interior;**

**UNITED STATES DEPARTMENT OF THE
INTERIOR; and**

**CHADWICK SMITH, Individually and in His
Official Capacity,**

Defendants.

**Case No: 1:03cv01711 (HHK)
Judge: Henry H. Kennedy
Docket Type: Civil Rights
(non-employment)**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
FREEDMEN PLAINTIFFS' MOTION TO CONSOLIDATE RELATED CASES**

Pursuant to Federal Rule of Civil Procedure 42(a), Plaintiffs Marilyn Vann, Ronald Moon, Donald Moon, Charlene White, Ralph Threat, Faith Russell, Angela Sanders, Samuel E. Ford, and The Freedmen Band of the Cherokee Nation of Oklahoma (the "Freedmen Plaintiffs") hereby move to consolidate the above-captioned action with *The Cherokee Nation v. Nash*, Civil Case No. 1:10-cv-1169 (HHK), a related action originally filed by the Cherokee Nation in the U.S. District Court for the Northern District of Oklahoma against five similarly-situated Freedmen (the "Freedmen Defendants") and the Secretary of the Interior and the United States Department of the Interior (the "Federal Defendants") and transferred in July 2010 to this Court.¹

¹ The Freedmen Defendants in *The Cherokee Nation v. Nash* have filed a substantially similar motion to consolidate these two cases.

Because these two cases involve substantially similar parties and identical facts and legal arguments, judicial efficiency would be served by consolidating the two cases for all purposes.

I. BACKGROUND

The Court is familiar with the facts of the controversy between the Freedmen,² the Cherokee Nation and its officers, and the Federal Defendants regarding the Freedmen's citizenship rights, as well as the procedural postures of the two federal actions that have arisen out of that controversy. The Freedmen will highlight only those facts relevant to the instant motion.

On August 11, 2003, a group of six individual Cherokee Freedmen filed suit in this Court against Gale Norton, then Secretary of the Interior, and the United States Department of Interior. Civil Case No. 1:03-cv-01711 (HHK) (the "D.C. Action"). On January 14, 2005, the Cherokee Nation of Oklahoma filed a Limited Motion to Intervene for the purpose of moving to dismiss the D.C. Action. (D.C. Action Doc. No. 17). On September 8, 2005, this Court granted the Cherokee Nation's motion to intervene and deemed as filed on that date the Cherokee Nation's Motion to Dismiss. (D.C. Action Doc. Nos. 22 and 23).

On September 23, 2005, the Freedmen Plaintiffs in the D.C. Action (the "D.C. Plaintiffs")

² Except where necessary for procedural reasons to distinguish between the Freedmen Plaintiffs here and the Freedmen Defendants in the transferred action, both groups will be referred to herein collectively as "the Freedmen." Both groups are represented by the same legal counsel and, as Judge Kern recognized in his Transfer Order, although the five individual Freedmen named as defendants in the transferred action differ from the named plaintiffs in this action, [f]or purposes of deciding the questions presented in both lawsuits, it makes little difference which individual Freedmen are parties. [The] D.C. Individual Plaintiffs are simply other Freedmen asserting rights contrary to the declaratory relief sought by the Cherokee Nation in this case, and they could be readily substituted as defendants in this case without effecting any substantive change in the declaratory action. In addition, the presence of Freedmen Band as a plaintiff in the D.C. Action renders the parties in the two suits even more similar because all Freedmen Defendants are members of this political organization...[.]

Transfer Order at 16-17.

or “Freedmen Plaintiffs”) filed a Motion for Leave to file an Amended Complaint to add the Cherokee Nation of Oklahoma and Principal Chief Chadwick Smith as Defendants, to add causes of action seeking relief under the 13th and 15th Amendments to the U.S. Constitution, to assert jurisdiction under the Treaty of 1866, and to add other relevant facts. (D.C. Action Doc. No. 26).

On December 19, 2006, this Court denied the Cherokee Nation’s motion to dismiss and granted the Freedmen Plaintiffs leave to add the Cherokee Nation Defendants as parties. *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006) (“*Vann I*”). This Court held that the Cherokee Nation was not immune from suit for violations of the Thirteenth Amendment and thus could properly be joined as a party and that Chief Smith was “not immune from suit in these circumstances and may be added to this action.” *Id.* at 73.

On July 17, 2007, the D.C. Plaintiffs filed a motion for leave to file a third amended complaint to add additional Plaintiffs, including the Freedmen Band of the Cherokee Nation of Oklahoma (“Freedmen Band”), to add new factual allegations related to recent actions taken by the Cherokee Nation and the Bureau of Indian Affairs (“BIA”), and to assert additional claims for relief. (D.C. Action Doc. No. 87-4).

On July 29, 2008, the D.C. Circuit held that the Cherokee Nation is immune from suit but that the Freedmen Plaintiffs’ claims against tribal officers, including Chief Smith, may proceed under *Ex Parte Young*. *Vann v. Kempthorne*, 534 F.3d 741, 749-750 (D.C. Cir. 2008) (“*Vann II*”). On December 19, 2008, the Freedmen Plaintiffs filed their Fourth Amended Complaint to clarify the relief sought in light of the D.C. Circuit decision and to reflect the fact that the Cherokee Nation was no longer a party.

On January 30, 2009, Chief Smith and the Federal Defendants filed separate motions to dismiss the Fourth Amended Complaint. (D.C. Doc. Nos. 118 (Federal Defendants) and 119

(Chief Smith)). The Freedmen filed their Oppositions on March 2, 2009. (D.C. Doc. Nos. 123 (opposing Chief Smith's motion) and 124 (opposing Federal Defendants' motion)).

On February 3, 2009, two business days after Chief Smith filed his motion to dismiss, the Cherokee Nation filed its own, separate lawsuit in the United States District Court for the Northern District of Oklahoma ("Oklahoma District Court"). In that suit, the Cherokee Nation requested a declaratory judgment "that the Five Tribes Act and federal statutes modified the Treaty of 1866 thereby resulting in non-Indian Freedmen descendants, including the individual defendants, no longer, as a matter of federal law, having rights to citizenship of the Cherokee nation and benefits derived from such citizenship." *The Cherokee Nation v. Nash*, Civil Docket No. 4:09-cv-00052-TCK-PJC ("Oklahoma Action"). The Cherokee Nation in the Oklahoma Action did not sue any of the individual Freedmen who are plaintiffs in the D.C. Action or the Freedmen Band. Instead, the Cherokee Nation sued five different individual Freedmen, as well as the Federal Defendants.

On February 6, 2009, Chief Smith filed a Supplement to his Memorandum in Support of his Motion to Dismiss, (D.C. Action Doc. No. 120 ("Smith Supp. Mem.")), informing this Court of the Oklahoma Action and asserting that the Oklahoma Action constitutes a "procedurally appropriate avenue . . . for Plaintiffs to judicially resolve their asserted and disputed claim that the Treaty of 1866 between the Cherokee Nation and the United States currently entitles them to rights of Cherokee Nation citizens." (Smith Supp. Mem. at 2).

On March 14, 2009, the Freedmen Plaintiffs in the D.C. Action filed a motion for leave to file a fifth amended complaint, which seeks to add the Cherokee Nation of Oklahoma as a Defendant in the D.C. Action and to add the five individual Freedmen sued by the Cherokee Nation in the Oklahoma Action as additional Plaintiffs. (D.C. Action Doc. No. 127). The

Freedmen in that motion argue that the Cherokee Nation, by filing the Oklahoma Action, waived its sovereign immunity and may now be added as a Defendant in the D.C. Action. On May 29, 2009, the Freedmen Defendants and the Federal Defendants in the Oklahoma Action filed separate motions to transfer that action to the District of Columbia. (Transferred Action Doc. Nos. 18 (Federal Defendants) and 20 (Freedmen Defendants)).

On June 18, 2009, the Freedmen Defendants filed their Amended Answer, their Counterclaims Against the Cherokee Nation of Oklahoma, and their Cross-Claims Against Federal Defendants in the Oklahoma Action. (Transferred Action Doc. Nos. 31, 32, and 33). The Freedmen Defendants' Counterclaims and Cross-Claims in the Oklahoma Action mirror the claims made in the Freedmen Plaintiffs' fourth amended complaint and proposed fifth amended complaint in the D.C. Action.

On July 2, 2010, Judge Terence Kern of the Northern District of Oklahoma entered an order transferring this action to this Court ("Transfer Order"). (Transferred Action Doc. No. 48). Judge Kern, having found that the parties and issues in the Oklahoma Action were substantially similar to those in the D.C. Action, held that under the "first to file rule," this Court should determine whether the Oklahoma Action should be heard in the District of Columbia, where a parallel suit has been pending since 2003, or whether, based on the Cherokee Nation's claims of forum immunity, the Oklahoma Action must be transferred back to the Northern District of Oklahoma. (Transfer Order at 21).

On July 12, 2010, the transferred action was initiated in this Court as Civil Case No. 1:10-cv-01169 (HHK) ("Transferred Action"). On July 13, 2010, the Cherokee Nation filed its motion to dismiss or transfer the Transferred Action. (Transferred Action Doc. No. 51). On August 30, 2010, the Freedmen Defendants and the Federal Defendants each filed their briefs in

opposition to the Cherokee Nation's motion. (Transferred Action Doc. Nos. 55 (Federal Defendants) and 57 (Freedmen Defendants)). On August 31, 2010, the Federal Defendants filed their Motion to Dismiss Cross-Claims (Transferred Action Doc. No. 58), to which the Freedmen Defendants filed their Opposition on September 30, 2010 (Transferred Action Doc. No. 64).

On October 6, 2010, the Cherokee Nation filed an unopposed motion to dismiss its claims against the Federal Defendants in the Transferred Action without prejudice. (Transferred Action Doc. No. 65).

II. ARGUMENT

A court may consolidate two or more actions pending before it if those actions “involve a common question of law or fact.” Fed. R. Civ. P. 42(a). To determine whether to consolidate, a court considers whether “savings of expense and gains of efficiency can be accomplished without sacrifice of justice.” *Hanson v. District of Columbia*, 257 F.R.D. 19, 21 (D.D.C. 2009) (internal quotation omitted). Consolidation is “particularly appropriate” where, as here, two actions involve the some or all of the same parties and “are likely to involve the same witnesses and arise from the same series of events or facts.” *Id.* at 21. Here, consolidation is appropriate because both actions are at a similar stage of procedural development, and involve identical facts and legal issues and substantially similar parties. *See Blasko v. Washington Metro. Area Transit Auth.*, 243 F.R.D. 13, 16 (D.D.C. 2007).

Both the Transferred Action and the D.C. Action “ultimately turn on interpretation of the 1866 Treaty and subsequent congressional actions, and both cases seek a resolution to the question of whether Freedmen are entitled to rights originally bestowed in the 1866 Treaty.” (Transfer Order at 18). The counterclaims against the Cherokee Nation and cross-claims against the Federal Defendants brought by the Freedmen Defendants in the Transferred Action are nearly identical to those brought by the Freedmen Plaintiffs against Chief Smith and the Federal

Defendants here in the D.C. Action. (*See Id.* at 18; Transferred Action Doc. No. 58-1 at 2).³

The Federal Defendants in both actions (*i.e.*, the Secretary of the Interior and the U.S. Department of the Interior) are identical. The Freedmen Defendants in the Transferred Action and the Freedmen Plaintiffs in the D.C. Action, though not identical as the procedural postures of the cases currently stand, are substantially similar “because they are all representative Freedmen who desire a certain status within the Cherokee Nation,” and furthermore are represented by the same legal counsel. (Transfer Order at 16). The Cherokee Nation and Chief Smith are also substantially similar for purposes of these two actions because they (i) have taken identical legal positions in the Transferred Action and the D.C. Action, (ii) have no conflicting interests, and (iii) are represented by the same counsel. (*See* Transfer Order at 17).

Although, as Judge Kern noted in his Transfer Order, there is currently “one glaring difference” between the Cherokee Nation and Chief Smith – namely, that the Cherokee Nation is at present immune from suit in the D.C. Action while Chief Smith is not – consolidation of the two cases “for all purposes” under Rule 42(a) does not require a finding that the Cherokee Nation waived its immunity as to the D.C. Action, because the two actions will each retain their separate procedural postures.⁴ *See, e.g., Cablevision Sys. Dev. Co v. Motion Picture Ass’n of*

³ On October 6, 2010, the Cherokee Nation filed an Unopposed Motion to Dismiss Without Prejudice its claims against the Federal Defendants in the Transferred Action. (Transferred Action Doc. No 65). Dismissal of those claims, however, would not affect the appropriateness of consolidation of these two cases, because the two cases will continue to involve common – in fact, nearly identical – questions of law and fact. *See, e.g., Santucci v. Pignatello*, 188 F.2d 643, 644-45 (D.C. Cir. 1951) (“Common questions of law and fact do appear in the two actions here consolidated. [...] Under these circumstances the actions fulfilled all the necessary conditions, and the question of consolidation was a matter within the sound discretion of the District Court.”).

⁴ The Freedmen continue to assert, as they have previously argued in both the Transferred Action and the D.C. Action, that the Cherokee Nation has waived its sovereign immunity as to the D.C. Action by filing suit on the same subject matter in a federal court. (*See* D.C. Action Doc. Nos. 127 and 130).

Am., Inc., 808 F.2d 133, 135 (D.C. Cir. 1987) (“[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.”) (quoting *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97 (1933)). The Cherokee Nation has unquestionably waived its immunity in the Transferred Action (by the act of filing suit in a federal court), and both the Cherokee Nation and Chief Smith are “similarly situated ... for purposes of prosecuting or defending the legal positions being asserted” in these two actions. (Transfer Order at 17). Consolidation of these two cases for discovery and trial is therefore in the interests of justice because it will eliminate unnecessary duplication of effort by the Court and all parties with regard to the adjudication of the claims in both actions. *See, e.g., Chang v. U.S.*, 217 F.R.D. 262, 265 (D.D.C. 2002) (“Consolidation may increase judicial efficiency by reducing presentation of duplicative proof at trial, eliminating the need for more than one judge to familiarize themselves with the issues presented, and reducing excess costs to all parties and the government.”).

III. CONCLUSION

Because the cases involve common questions of law and fact, and substantially similar parties, the Transferred Action and this first-filed D.C. Action should, in the interests of justice, be consolidated for all purposes.

Dated: October 15, 2010

Respectfully submitted,

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