UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.E.S., V.A.S., and H.M.S., Minors, by Next Friends Timothy P. Donn and Anne L. Donn,	)	
Plaintiffs,	)	Case No. 1:15-cv-982
	)	HON. Janet T. Neff
v.	)	
Hon. Larry J. Nelson, in his official capacity as a Leelanau County Family Court Judge, Matthew Feil, in his official capacity as Tribal Prosecutor for the Grand Traverse Band of Ottawa and Chippewa Indians, and Helen Cook in her official capacity as Supervisor of Anishinaabek Family Services for the Grand Traverse Band of Ottawa and Chippewa Indians,	)	
Defendants.	)	

RESPONSE TO PRE-MOTION CONFERENCE REQUEST

Plaintiffs file this response to the Michigan Attorney General's request for a pre-motion conference for the purposes of intervening and asserting defenses in support of dismissal.

First, Plaintiffs were not obligated to serve notice on Michigan's Attorney General. Federal Rule of Civil Procedure 5.1(a) and 28 U.S.C. § 2403 expressly recognize that notice is not required when a state official or employee is sued in an official capacity. *See* 4B Fed. Prac. & Proc. Civ. § 1154 n.1 (4th ed. April 2015) (online version) (citing *Peterson v. Prosser*, 2008 WL 2857403 (N.D. Iowa 2008) ("no separate notice of constitutional challenge is required when

state officer or employee, in his or her official capacity, is named as party")). The Honorable Larry J. Nelson is a Michigan state official and employee, sued in his official capacity; therefore, notice was not required. Since the notice and certification provisions of Fed. R. Civ. P. 5.1 have not been invoked, intervention should be permissive rather than mandatory.

Regardless of whether intervention is permissive or mandatory, the Attorney General's arguments should be heard because Plaintiffs intend to seek leave to file a Second Amended Complaint to add the Attorney General as a defendant to this litigation. Plaintiffs did not initially name the Attorney General as a defendant because the Attorney General was not specifically enforcing the legality of the subject MIFPA provisions. However, the Attorney General now seeks to intervene specifically to enforce the validity of those laws. As a result, jurisdiction over the Attorney General exists under *Ex parte Young*, 209 U.S. 123 (1907).

Second, *Rooker-Feldman* abstention is inapplicable. "*Rooker-Feldman* is a doctrine with only limited application." *Coles v. Granville*, 448 F.3d 853, 857 (6th Cir. 2006). Critically, the *Rooker-Feldman* doctrine does not bar federal suits by nonparties to the state litigation. *See, e.g., Lance v. Dennis*, 546 U.S. 459, 464 (2006). None of the Children here are 14 years of age or older. Children under 14 are not real parties in interest to adoption proceedings in Michigan state court. MCL § 710.24a(1)(b). Accordingly, the narrow reach of the *Rooker-Feldman* abstention doctrine does not apply here.

Finally, this action is not barred by the doctrine of res judicata. In order for res judicata to apply, a defendant must establish that: "(1) the former suit was decided on the merits, (2) the issues in the second action were or could have been resolved in the former action, and (3) both actions involved the same parties or their privies." *Phinisee v. Rogers*, 582 N.W.2d 547, 551 (Mich. Ct. App. 1998) (citation omitted). Under Michigan law, "privity has been defined as

mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." *Sloan v. City of Madison Heights*, 425 Mich. 288, 389 N.W.2d 418 (1986) (internal quotes omitted). The Children were not in privity with the Donns during the state court proceeding. The Donns represented only their own interests as one of two competing parties to adopt the Children. The Children's guardian ad litem was not a party to the Children's adoption proceedings under Michigan law, so res judicata cannot be established through that relationship. *See* MCL § 710.24(a)(1)(b). This is the first action where the Children properly seek to enforce their own constitutional rights.

Plaintiffs respectfully request that the Court hear the pre-motion conference on the Attorney General's motion on December 28, 2015 at 1:30 p.m., at which time the Court is scheduled to hold a pre-motion conference on the tribal defendants' motion to dismiss.

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