

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and  
SHAMBER FLORE; ST. VINCENT  
CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official  
capacity as the Director of the Michigan  
Department of Health and Human Services;  
HERMAN MCCALL, in his official capacity  
as the Executive Director of the Michigan  
Children's Services Agency; DANA NESSEL,  
in her official capacity as Michigan Attorney  
General; ALEX AZAR, in his official capacity  
as Secretary of Health and Human Services;  
UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Defendants.

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No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

**STATE DEFENDANTS'  
MOTION TO TRANSFER OR,  
ALTERNATIVELY, TO  
DISMISS**

**ORAL ARGUMENT  
REQUESTED**

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**STATE DEFENDANTS' MEMORANDUM MOTION TO TRANSFER OR,  
ALTERNATIVELY, TO DISMISS**

Defendants Robert Gordon, JooYuen Chang,<sup>1</sup> and Dana Nessel (collectively, “State Defendants”) respectfully move this court to transfer the above-captioned case to the Eastern District of Michigan, pursuant to 28 U.S.C. § 1404(a) or, alternatively, to dismiss this Action pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1). In support of this motion, State Defendants state as follows:

1. Plaintiffs’ Complaint essentially challenges the enforcement of a consent decree approved and entered by the Honorable Paul D. Borman of the United States District Court for the Eastern District of Michigan in *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017) (“*Dumont*”). Because Judge Borman retained jurisdiction over the enforcement of the settlement agreement forming the basis of the consent decree, this Court should transfer this matter to the Eastern District of Michigan under 28 U.S.C. § 1404(a).

2. Alternatively, should this Court retain this matter, this case should be dismissed because the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion should be granted when “it is clear that no relief could be granted under any set of facts that could be proved

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<sup>1</sup> Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this joint motion reflects the substitution of Children’s Services Agency Executive Director JooYuen Chang for former Children’s Services Agency Executive Director Herman McCall, who was named in his official capacity.

consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Here, Plaintiffs’ claims are barred by res judicata based on the final judgment in *Dumont*. Moreover, Plaintiff’s Religious Freedom Restoration Act claim cannot be asserted against State Defendants, and no viable claims have been asserted against Defendant Dana Nessel, Michigan’s Attorney General.

3. This Court also lacks subject matter jurisdiction regarding Plaintiffs’ claims. When a plaintiff lack standing, the Court does not have subject matter jurisdiction and the complaint must be dismissed under Fed. R. Civ. P. 12(b)(1). *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991). Here, the Bucks and Flore have not suffered any cognizable injury and no Plaintiff has standing to assert the rights of foster children.

4. A court also may dismiss claims pursuant to Fed. R. Civ. P. 12(b)(1) where a party is entitled to Eleventh Amendment immunity. *See CPC Inter., Inc., v. Aerojet-General Corp.*, 764 F.Supp.2d 479, 482 (W.D. Mich. 1991). Plaintiffs’ request for damages against State Defendants is barred because they are entitled to Eleventh Amendment immunity regarding claims for damages.

5. In deciding a Rule 12(b)(6) motion, courts may consider “exhibits attached to defendant’s motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein.” *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008) (citation omitted); *see also Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2016) (explaining that consideration of exhibits attached to the pleadings that are central to the claims

will not convert the motion into one for summary judgment). Courts may also consider public records and matters of which a court may take judicial notice. See *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), abrogated on other grounds, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

Respectfully submitted,

Dana Nessel  
Attorney General

Dated: May 29, 2019

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