

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

DUANE MALETSKI,)
 SHARON LOPEZ,)
 FRANCES M. ZICK,)
 and all others similarly situated,)
 OBAMA FOR AMERICA, and)
 DEMOCRATIC NATIONAL COMMITTEE)
)
 PLAINTIFFS)
)
 v.)
)
)
 MACOMB COUNTY REPUBLICAN)
 PARTY,)
 MICHIGAN REPUBLICAN PARTY,)
 REPUBLICAN NATIONAL COMMITTEE,)
 and JOHN DOES #1-100,)
)
 DEFENDANTS.)

Case No. 08-cv-13982

Hon. David M. Lawson

CLASS ACTION

**PLAINTIFFS’ RESPONSE TO DEFENDANT RNC’S MOTION FOR EXPEDITED
CONSIDERATION OF MOTION TO DISMISS**

Duane Maletski, Sharon Lopez, Frances M. Zick, Obama for America, and the Democratic National Committee (hereinafter “Plaintiffs”), by counsel, submit this response to Defendant Republican National Committee’s motion for expedited consideration of its motion to dismiss.

1. Plaintiffs do not oppose expedited consideration of the RNC’s motion to dismiss, and Plaintiffs do not oppose the proposed briefing schedule. Plaintiffs submit this response to clarify three points.

2. First, despite the recitation in ¶12 of the motion for expedited consideration, counsel for the Individual Plaintiffs advised counsel for Defendant RNC that the Individual Plaintiffs did not

oppose expedited consideration of a motion to dismiss.¹ This case presents important issues that require attention before the November 4 Election Day, and Plaintiffs have no interest in delaying consideration of any issues that relate to the relief sought by Plaintiffs.

3. Second, to the extent that Defendant Michigan Republican Party intends to also file a motion to dismiss (as it has advised it intends to do), that motion should be filed by October 3, 2008, to allow for coordinated briefing.

4. Third, Plaintiffs note that Defendant RNC has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6),² which relates solely to the pleaded allegations. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). Nonetheless, Defendant RNC has attached an exhibit to its motion to expedite — something it calls the DNC playbook — in an apparent attempt to ask this Court to rely on materials outside the pleadings when analyzing the merits of the motion to dismiss.

5. Relying on the exhibit, Defendant RNC recites a series of allegations that it says mandate dismissal of this action:

9. This lawsuit comes straight from the Democratic National Committee's "playbook." The 2004 Democratic National Committee Election Day Manual (the "DNC Manual") encourages DNC organizers to "use minority intimidation as an organizing tool" and to use the "specialty media" to issue press releases to "place stories in which minority leadership expresses concern about the threat of intimidation tactics." See DNC Manual attached as Exhibit A. The DNC Manual motivates the Democratic Party's base to falsely allege that Republicans are intimidating voters, directing that even "if no signs of intimidation techniques have emerged yet, launch a 'pre-emptive strike...'" (Emphasis added).

10. The DNC's pre-emptive strike in Michigan this year uses the tactic of a story in the "specialty media"— in this case a liberal website blog known as the Michigan Messenger — and then file a

¹ Counsel for Plaintiffs Obama for America and the Democratic National Committee was unavailable due to the Jewish Holiday on September 30, 2008.

² The motion has also been brought under Fed. R. Civ. P. 12(b)(1), raising issues of standing, ripeness, and mootness, but the proffered exhibit does not relate to those arguments.

lawsuit for publicity based solely on that blog's report of an unsubstantiated quote that has been wholly disavowed by both the interviewee and the Defendants."

Defendant RNC's Motion for Expedited Consideration, ¶¶ 9 – 10.

6. This sort of argument, drawn from materials outside the pleadings, is not properly presented in a motion under Rule 12(b)(6), even when proffered under the guise of a motion for expedited consideration.

7. Because Defendant RNC relies on materials outside the pleadings to establish the basis of its motion to dismiss, the motion should be considered as having been brought under Rule 56 and Plaintiffs should be permitted to conduct expedited discovery in connection with their response. *See* Fed. R. Civ. P. 12(d); *see also Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 104 – 05 (6th Cir.1995).

8. Plaintiffs would limit their discovery to no more than five interrogatories and five document requests, to be served within 24 hours of entry of an order permitting such discovery. Defendant RNC should be compelled to respond no later than Tuesday, October 7, 2008, so that Plaintiffs can include those materials in their responsive papers.

Relief Requested

For these reasons, Defendants respectfully submit that they do not oppose expedited consideration of Defendant RNC's motion to dismiss but that this Court allow expedited discovery to respond to materials outside the pleadings.

Dated: October 1, 2008

Respectfully submitted,

/s/James R. Bruinsma
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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to:

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and I hereby certify that I have sent via U.S. Mail the paper to the following parties who have yet to appear in this action:

Macomb County Republican Party
48711 Van Dyke Avenue
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Dated: October 1, 2008

/s/James R. Bruinsma

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