IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al.,

Plaintiffs,

v. Case No. 11-CV-1128

GOVERNOR SCOTT WALKER, et al.,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EXPEDITED NON-DISPOSITIVE MOTION UNDER LOCAL RULE 7(h) TO INCREASE NUMBER OF DEPOSITIONS THAT MAY BE TAKEN BY PLAINTIFFS

Defendants, by their undersigned counsel, hereby file this memorandum in opposition to Plaintiffs' expedited, non-dispositive motion to increase the number of depositions Plaintiffs may take from 10 to 18. (Dkt. #102.) Plaintiffs' motion must be denied for the reasons that follow.

Plaintiffs have already exceeded the maximum number of depositions allowed by Fed. R. Civ. P. 30(a)(2) by taking 11 depositions. Plaintiffs deposed the following witnesses: Kevin Kennedy (GAB, February 20, 2012); Lynne Judd (DMV, February 21, 2012); Alison Lebwohl (DMV, March 28, 2012); Kristina Boardman (DMV, March 28, 2012); Jeremy Krueger (DMV, March 29, 2012); Ross Hein (GAB, March 29, 2012); Jim Miller (DMV, March 30, 2012); Patrick Fernan (DMV, April 2, 2012); Nathaniel Robinson (GAB, April 5, 2012); Janet Turja (DMV, April 5, 2012); and Michael Haas (GAB, April 9, 2012).[1]

[1]Plaintiffs did not reserve any of their 10 depositions to depose Defendants' expert witness, Professor M. V. (Trey) Hood, III. However, Defendants are willing to stipulate to Plaintiffs deposing Professor Hood.

Rule 30(a)(2) provides that a party seeking to take more than 10 depositions must first obtain leave of the court, "and the court must grant leave to the extent consistent with Rule 26(b)(2)[.]" Fed. R. Civ. P. 30(a)(2). Rule 26(b)(2)(C)(i) to (iii) permit a court to limit discovery if the court finds that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
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> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Parties seeking to exceed the 10 deposition limit "must make a particularized showing of why the discovery is necessary." *Lloyd v. Valley Forge Life Ins. Co.*, No. C06-5325 FDB, 2007 WL 906150, at *2 (W.D. Wash. Mar. 23, 2007) (citing *Bell v. Fowler*, 99 F.3d 262, 271 (8th Cir. 1996)); *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 187 F.R.D. 578, 586 (D. Minn. 1999)); *see also Whittingham v. Amherst College*, 163 F.R.D. 170, 171 (D. Mass. 1995).

There are several reasons why Plaintiffs' motion must be denied. First, Plaintiffs did not file a certification in support of their motion that complies with Civil Local Rules 7(h)(2) and 37 and this Court's scheduling orders, Dkts. #36, ¶ 8.a. and #74, ¶ 6.a. Specifically, Plaintiffs did not, pursuant to these orders and rules, include:

> a written certification by the movant that, after the movant in good faith has conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action, the parties are unable to reach an accord. The statement must recite the date and time of the conference or conferences and the names of all parties participating in the conference or conferences.

Second, Plaintiffs have not made a particularized showing why the additional depositions are necessary. They argue that the depositions are "necessary to develop facts pertaining to the implementation of Act 23 by GAB personnel and consultants, including photo ID implementation team members focused on, among other things, training, legal interpretation, public education, and fielding voter problems with compliance." (Dkt. #102 at 2.) Plaintiffs do not indicate why the 11 depositions they have already taken and the more than 165,000 pages of documents that Defendants produced in response to the 51 document requests that Plaintiffs issued are insufficient to satisfy Plaintiffs' ability to develop such facts. The requested depositions will be cumulative and duplicative of discovery already completed, and the burden of the depositions will not outweigh their benefit. Fed. R. Civ. P. 26(b)(2). Plaintiffs' initial document requests are filed herewith as Exhibit A to the Third Declaration of Clayton P. Kawski.

Plaintiffs do not make a particularized showing as to why they must depose GAB staff Diane Lowe, Shane Falk, and Allison Coakley. These individuals have already produced their e-mails and other documents responsive to Plaintiffs' voluminous document requests. Likewise, Lorraine Lathan's employer, KW2, has, in addition, produced thousands of pages of emails and documents in response to Plaintiffs' document requests. "The mere fact that many individuals may have discoverable information does not necessarily entitle a party to depose each such individual." *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 692 (D. Kan. 1996). Plaintiffs do not, as they must, indicate with particularity why Lowe, Falk, Coakley, and Lathan must be deposed.

Plaintiffs argue that they must depose an unnamed Milwaukee DMV CSC team leader, but they have not demonstrated why with particularity. (Dkt. #102 at 3.) They have not demonstrated what "practices differ across CSCs," *id.* at 2-3, that makes deposing a Milwaukee DMV CSC team leader add value in discovery when they have already deposed Waukesha DMV

CSC team leader Janet Turja. Thus, Plaintiffs request 18 depositions, yet, they attempt only to argue a specific justification for deposing four additional named witnesses. (*Id.*)

Third, Plaintiffs argue that the "complexity of the legal and factual issues in this matter, as well as the number of claims pending," justifies permitting 18 depositions. (Dkt. #102 at 3.) An assertion that a case is "complex" is insufficient to justify deviation from the presumptive number of depositions. *See, e.g.*, *Whittingham*, 163 F.R.D at 170. Plaintiffs do not explain what about the complexity of or claims at issue necessitate deposing more than 10 witnesses.

Finally, the Court must, at a minimum, balance the burden or expense of the proposed discovery against the likely benefit, and determine if the discovery sought would be cumulative or duplicative. Fed. R. Civ. P. 26(b)(2). Defendants—the GAB, DMV, and their staffs, in particular—have been severely burdened by the voluminous discovery requests that Plaintiffs have served to date. Requiring additional, substantial time commitments for Defendants and their staff to be deposed will not provide any demonstrable benefit and would be cumulative and duplicative of the hours of deposition testimony and thousands of pages of e-mails and documents that Plaintiffs currently have in their possession from Defendants. For the reasons asserted herein, Defendants respectfully request that the Court deny Plaintiffs' motion.

Dated this 13th day of July, 2012.

Respectfully submitted,

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