

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

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RUTHELLE FRANK, et al.,

Plaintiffs,

v.

Case No. 11-CV-1128

GOVERNOR SCOTT WALKER, et al.,

Defendants.

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**DEFENDANTS' MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO  
EXCLUDE FOUR OF DEFENDANTS' RECENTLY DISCLOSED WITNESSES**

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Defendants, by their undersigned counsel, respectfully submit this memorandum in opposition to Plaintiffs' Civil L.R. 7(h) expedited non-dispositive motion to exclude four of Defendants' recently disclosed witnesses. Plaintiffs' motion must be denied.

First, from approximately fall 2012 to July 29, 2013 (when the Court scheduled this case for trial), the parties in this case and in *Jones v. Deininger* were in a litigation holding pattern as they awaited Wisconsin Court of Appeals decisions in the two state court cases challenging the constitutionality of 2011 Wisconsin Act 23 ("Act 23"). Promptly following this Court setting a trial date, Defendants served supplemental disclosures on Plaintiffs.<sup>1</sup> Plaintiffs have served no supplemental disclosures on Defendants since this case was set for trial.

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<sup>1</sup>Plaintiffs in *Jones v. Deininger* have not objected to Defendants' August 12, 2013, Supplemental Disclosures, which identify the same potential witnesses as the supplemental disclosures served on the *Frank* Plaintiffs.

Second, Plaintiffs are not prejudiced by Defendants' August 12, 2013, Supplemental Disclosures of Michael Sandvick, Sue Ertmer, Jeanette Merten, and Bruce Landgraf. On August 21, 2013, Defendants offered via e-mail to stipulate to the re-opening of discovery as to these witnesses to facilitate Plaintiffs' preparation for trial. Fourth Declaration of Clayton P. Kawski ("Fourth Kawski Decl."), Ex. A, filed herewith. Re-opening discovery as to these four witnesses only would not be burdensome for the parties and would allow Plaintiffs to complete depositions or written discovery prior to trial. Rather than reaching a compromise on this matter, Plaintiffs preferred to trouble the Court with an unnecessary discovery motion.

The date of Defendants' offer to stipulate to additional discovery was August 21—75 days from the first day of trial on November 4, 2013. With this amount of time before trial, there is plenty of opportunity for Plaintiffs to conduct formal discovery as to these four potential defense witnesses. Furthermore, the parties do not have to identify their witnesses for trial until October 14, 2013.<sup>2</sup> (Dkt. #123 at 1.) In the interest of allowing Plaintiffs more time for trial preparation, Defendants disclosed the information on August 12. Rather than stipulating to discovery and preparing for trial, Plaintiffs preferred to raise the issue with the Court.

Defendants also indicated in their offered stipulation to Plaintiffs that, since Defendants' counsel does not represent these witnesses in this case, Plaintiffs are welcome to informally conduct discovery by contacting these four witnesses directly. Fourth Kawski Decl., Ex. A. In other words, Plaintiffs could have picked up the phone and called Mr. Sandvick, Mr. Landgraf, Ms. Merten, or Ms. Ertmer. Instead, they filed the instant motion.

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<sup>2</sup>Plaintiffs seek to impose a requirement that only those witnesses listed in a party's initial disclosures may be listed on a witness list for trial, but the Court did not impose any such requirement. "Ordinarily, discovery is not the stage of litigation at which a party identifies its prospective witnesses; the pretrial conference is the appropriate occasion on which to identify witnesses." 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1525 (3d ed. 2010).

Third, with regard to Mr. Landgraf, Plaintiffs' March 7, 2012, Initial Disclosures identified Mr. Landgraf as an individual that "may have discoverable information concerning investigations of voter fraud." Fourth Kowski Decl., Ex. B at 5. It is hard to imagine how Plaintiffs are prejudiced by Defendants' August 12, 2013, disclosure of Mr. Landgraf as an individual with discoverable information when Plaintiffs disclosed him as a witness over one year and five months ago. Moreover, Defendants' March 7, 2012, Initial Disclosures incorporated by reference all of Plaintiffs' disclosures. Fourth Kowski Decl., Ex. C at 4. As to Defendants' recent disclosure of Mr. Landgraf, in particular, there is no prejudice.

Fourth, as to Ms. Merten and Ms. Ertmer, these witnesses have firsthand knowledge about voting procedures and the impact of a voter photo identification requirement on the integrity of elections in Wisconsin and on voter confidence, as they are a county clerk and a municipal clerk, respectively. Defendants are not submitting these witnesses as "experts" to give expert testimony. They have firsthand knowledge of voting procedures in Wisconsin as "boots on the ground" witnesses. Both individuals helped administer elections in February 2012 when Act 23 was in effect.

Finally, Mr. Sandvick has not been identified as a potential defense witness to give "expert" testimony or opinions. He has firsthand knowledge of investigations of voter fraud, as evidenced by the 2004 report that he prepared. *See* Dkt. #128-1 at 4.

In conclusion, this case has been essentially dormant for one year, with the parties taking no action regarding discovery because Act 23 has been permanently enjoined in state court. Defendants have attempted to accommodate Plaintiffs by offering to stipulate to discovery as to four witnesses to prepare for a trial date that is rapidly approaching. There is no prejudice to

Plaintiffs if they agree to that stipulated discovery. But, they refuse. For the reasons stated herein, Plaintiffs' motion must be denied.

Dated this 30th day of August, 2013.

Respectfully submitted,

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