UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al., Defendants.	Civil Action No. 2:11-cv-01128 (LA)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO STRIKE

Defendants have moved to strike certain documents submitted by Plaintiffs in support of their reply. As discussed below, Defendants' motion should be denied.

I. THE MATTERS RAISED IN PLAINTIFFS' REPLY WERE APPROPRIATE

Contrary to Defendants' suggestion, Plaintiffs did not raise "new" arguments in their reply. Rather, Plaintiffs provided updated information in support of issues raised previously, or in support of responses to Defendants' arguments which were themselves newly raised in opposition. It would be "absurd to say that reply briefs are allowed but that a party is proscribed from backing up its arguments in reply with the necessary evidentiary material. Such a rule would allow the party opposing the motion to gain an unfair advantage by submitting issues and evidentiary support that were unforeseen at the time the motion was first proffered." *Baugh v. City of Milw.*, 823 F. Supp. 1452, 1456-57 (E.D. Wis. 1993), *aff'd*, 41 F.3d 1510 (7th Cir. 1994); *see also Bell v. DaimlerChrysler Corp.*, 547 F.3d 796, 806 (7th Cir. 2008) ("belated citation" to additional material in reply was "natural and reasonable response" to opposition brief). Indeed, "[m]otions to strike are disfavored and reserved [only] for egregious rule violations." *Deprez v. Journal Sentinel Inc.*, No. 10C0294, 2011 WL 2470620, at *1 n.1 (E.D. Wis. June 20, 2011).

This Court should thus deny Defendants' request to strike the declarations of potential substitute representatives (Dkt. ##238-1, 2, 3, 4, 5). The issue of substitution and Plaintiffs' argument about the inefficiency of endless *ad seriatim* litigation had already been raised in Plaintiffs' Post-Trial Brief (Dkt. #194 at 105 n.62; 93-94), and Plaintiffs should be permitted to provide up-to-date declarations in support of those arguments. Those declarations, as well as the recent numbers reported by the Wisconsin Technical College System and the Flower declaration (Dkt. ##238-8, 21), also respond to Defendants' numerosity arguments concerning Classes 3, 4, and 6, none of which had been raised in their Post-Trial Brief (*see* Dkt. #176 at 100-102).

This Court should also deny Defendants' attempts to strike the remaining documents.

Materials on uniformed services and VA ID cards (Dkt. ##238-14, 17) respond to Defendants' new "military relocation" hypothesis, never argued in their Post-Trial Brief (*see* Dkt. #176 at 122-125). *See, e.g.*, *Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 932 n.25 (E.D. Wis. 1999) (declining to strike evidence submitted in response to new argument). The new emergency rules and the recent April 29, 2015 GAB memorandum (as well as the Baker and Davis declarations) (Dkt. ##238-3, 6, 19, 20), all respond to Defendants' new argument (and to the new Boardman declaration (Dkt. #229)) asserting that the post-*NAACP* procedure cures the burdens associated with obtaining ID. The South Carolina affidavit form (Dkt. #238-22) demonstrates the simplicity of the remedy Plaintiffs seek and was filed in response to Defendants' argument that Plaintiffs' requested relief was so complex it amounted to "judicial legislation" (Dkt. #228 at 1). And Plaintiffs had previously argued extensively in support of the affidavit option, citing South Carolina repeatedly as an example (Dkt. #194 at 90-92). The Thompson declaration (Dkt. #238-7) was submitted in response to Defendants' new argument about the supposed significance of Brown obtaining ID after trial, and to highlight Defendants' apparent effort to "pick off" potential class representatives like Brown and Thompson post-trial. Lastly, the up-to-date materials from the Indiana BMV (Dkt. #238-18) help respond to the incorrect argument that *Crawford* forecloses a poll tax claim, while the documents concerning other states' inclusion of VA ID (Dkt. ##238-15, 16) help to support Plaintiffs' prior argument about the irrationality of excluding VA ID.

II. "STRIKING" THE MATERIALS IS NOT THE PROPER REMEDY UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE

In any event, the decision as to whether to strike materials is well within the Court's discretion, *see Black v. TIC Inv. Corp*., 900 F.2d 112, 116 (7th Cir. 1990), and a court should not exercise it when, as here, exclusion would be too drastic or disproportionate, *cf. Shurr*, 70 F.

Supp. 2d at 931. Over three years have passed since Plaintiffs' class certification motion was first filed, and this case has persisted through a year-long stay, an extensive two-week trial, the adjudication of some but not all of Plaintiffs' claims, and rulings by the Wisconsin Supreme Court and the Seventh Circuit. In light of these developments, and especially after Defendants introduced new evidence in their opposition brief, Plaintiffs have attempted to provide this Court with the most up-to-date materials to support arguments already made, and to help the Court make its most informed decision. Furthermore, given this passage of time, Defendants' repeated (and incorrect) complaints about the alleged mootness of the existing class representatives, and the "nominal" role that class representatives play, *Phillips v. Asset Acceptance*, 736 F.3d 1076, 1080 (7th Cir. 2013), it was also appropriate for Plaintiffs to introduce declarations of potential substitute class representatives. In addition, these declarations were provided for the sake of completeness, should the Court disagree with Plaintiffs' argument that substitution is not necessary. And Defendants have not argued prejudice. For these reasons, exclusion of these documents would be disproportionate and drastic.

Even if the Court finds that any of the documents support "new" arguments raised for the first time on reply (and it should not), the appropriate remedy would be to allow Defendants to respond through a surreply. *See Baugh*, 823 F. Supp. at 1457; *Black*, 900 F.2d at 116. Alternatively, and as Defendants appear to concede (Dkt. #240 at 2), the Court could grant Plaintiffs leave to amend the complaint, and, if the Court believes it is necessary, permit Defendants to conduct limited discovery of factual materials concerning issues this Court believes are "new."

CONCLUSION

For the reasons set forth herein, this Court should deny Defendants' Motion to Strike.

Dated this 3rd day of June, 2015.

Respectfully submitted,

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General Information

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Status	Closed