

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

---

RUTHELLE FRANK, et al.,

Plaintiffs,

v.

Case No. 11-CV-1128

SCOTT WALKER, et al.,

Defendants.

---

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT**

---

**INTRODUCTION**

This action was filed over six years ago. Since that time, the parties have conducted discovery, litigated, briefed and argued issues spanning two complaints<sup>1</sup>, two supplemental complaints<sup>2</sup>, a trial<sup>3</sup>, and three rounds in the Seventh Circuit Court of Appeals.<sup>4</sup> The Plaintiffs seek to add another procedural setback by introducing a fifth complaint, adding new facts and parties. (See Dkt. 342-1.) Their supplemental pleading creates an ambiguity as to the remaining issues in the case, is untimely, and violates E.D. Wis. Civil Local Rule 15(a). Given this, the motion for leave to file this supplemental complaint should be denied.

---

<sup>1</sup> Dkt. 1, 31.

<sup>2</sup> Dkt. 303, 326.

<sup>3</sup> See Dkt. 165, 166–71.

<sup>4</sup> *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016); *Frank v. Walker*, Case Nos. 16-3003 & 16-3052 (7th Cir.).

## ARGUMENT

### **I. This Court should deny Plaintiffs' request for leave to file a supplemental pleading.**

Generally, judicial decisions to grant or deny Fed. R. Civ. P. 15(d) motions to supplement pleadings are based on fairness factors that the courts weigh when considering motions to amend pleadings under Rule 15(a). *See Glatt v. Chic. Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). A court may consider several factors in granting or denying a motion for leave to file a supplemental pleading including undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment. *Johnson v. Cypress Hill*, 641 F.3d 867, 871–72 (7th Cir. 2011); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here, Plaintiffs' proposed supplemental complaint is the third addendum to the first amended complaint filed back in 2012. (*See* Dkt. 31.) It seeks to add an additional plaintiff, Brenda Wells, who allegedly received an IDPP receipt valid for voting, but was not aware how to perfect her provisional ballot so it could be counted in the November 2016 election. (Dkt. 342-1:3.) The supplemental complaint also challenges voter education efforts made by the defendants prior to the 2016 Presidential election, and adds a new disparate treatment claim relating to the issuance of IDPP

receipts to people accompanied by voting advocates, as opposed to those who were not.<sup>5</sup> (Dkt. 342-1:4.)

Nothing in Plaintiff's motion or proposed supplemental complaint explains why they waited over a year after the events described therein to seek an amendment. While "[d]elay on its own is usually not reason enough for a court to deny a motion to amend," *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008), the longer the delay, "the greater the presumption against granting leave to amend." *Id.* (quoting *King v. Cooke*, 26 F.3d 720, 723 (7th Cir. 1994)).

Plaintiffs have had several opportunities to amend their complaint since the 2016 election. Given the extensive and fluctuating procedural history of this case, waiting over a year to do so is unreasonable. With each supplement there have been new parties, new discovery, and new legal theories to explore—all of which extend the time, effort, and expense of the litigation. As the Seventh Circuit has made clear, "[t]here must be a point at which a plaintiff makes a commitment to the theory of its case." *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1304 (7th Cir. 1993). After six years,

---

<sup>5</sup> Plaintiffs also request dismissal of Plaintiffs Anthony Judd, Nancy Lea Wilde, Anna Shea, Andrew Voegele, and Frank Ybarra in their supplemental complaint. While the defendants do not object to dismissal of these Plaintiffs, they object to this type of amendment without adherence to Civil L.R. 15. See Argument II, *supra*.

that time has passed. Plaintiffs' delay and repeated substitutions of parties and legal theories weigh against allowing any further amendment.

**II. The Court should require adherence to E.D. Wis. Civil Local Rule 15.**

Even if the court were inclined to allow further supplementation of the operative complaint, E.D. Wis. Civ. L.R. 15(a) requires that Plaintiffs produce the entire complaint as supplemented. In this case, the rule's requirement is especially important, as the parties, facts, and legal theories have evolved throughout the course of amendments, litigation and appeals. Because their filings do not conform to the requirements of E.D. Wis. Civ. L.R. 15(a), their motion to supplement should be denied.

Under E.D. Wis. Civ. L.R. 15(a), “[a]ny amendment to a pleading . . . must reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference.” E.D. Wis. Civ. L.R. 15(a). As the caption to the rule indicates, these requirements apply to both amended and supplemental pleadings. *Id.*; see also *McDaniel v. Meisner*, No. 12-CV-1178, 2014 WL 1908620, at \*2 (E.D. Wis. May 13, 2014) (applying E.D. Wis. Civ. L.R. 15(a) where plaintiff “intended to supplement his complaint”); *Cherry v. Eckstein*, No. 16-C-1695, 2017 WL 318824, at \*1 (E.D. Wis. Jan. 23, 2017) (applying E.D. Wis. Civ. 15(a) to a supplement to an original petition for habeas corpus).

Here, given the lengthy history of this case since 2012, including multiple supplementations, class certification, and rejection of some claims by the Seventh Circuit, it is unclear which of the 10 initial claims are being asserted by the remaining defendants individually, versus as a class, and which of the remaining claims concern any of the individually-named Plaintiffs.

The proposed amendment even includes requests that five of the current plaintiffs should be permitted to withdraw from the case. (Dkt. 342-1 ¶¶ 18–19.) That type of request is not an appropriate allegation for a complaint. A restated pleading would clarify what parties, and what claims, the plaintiffs believe should still be involved in this lawsuit.

Courts have emphasized the importance of local rules and have repeatedly upheld a district court's discretion to require strict compliance with them. *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002). E.D. Wis. Civ. L.R. 15(a) serves the important purpose of eliminating any confusion over the operative facts, claims, and parties to the action. This purpose is particularly applicable here. Thus, even if the Court is inclined to grant the Plaintiffs leave to supplement their complaint, such leave should not be granted until the requirements of Rule 15(a) are met.

Dated this 18th day of January, 2018.

Respectfully submitted,

BRAD D. SCHIMEL  
Wisconsin Attorney General

/s/ S. Michael Murphy  
S. MICHAEL MURPHY  
Assistant Attorney General  
State Bar #1078149

GABE JOHNSON-KARP  
Assistant Attorney General  
State Bar #1084731

JODY J. SCHMELZER  
Assistant Attorney General  
State Bar #1027796

Attorneys for Defendants

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-5457 (Murphy)  
(608) 267-8904 (Johnson-Karp)  
(608) 266-3094 (Schmelzer)  
(608) 267-2223 (Fax)  
murphysm@doj.state.wi.us  
johnsonkarp@doj.state.wi.us  
schmelzerjj@doj.state.wi.us

## General Information

<b>Court</b>	United States District Court for the Eastern District of Wisconsin; United States District Court for the Eastern District of Wisconsin
<b>Federal Nature of Suit</b>	Civil Rights - Voting[441]
<b>Docket Number</b>	2:11-cv-01128