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)

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Defendants oppose Plaintiffs' request to file a Supplemental Complaint pursuant to Federal Rule of Civil Procedure 15(d) by arguing that Plaintiffs unduly delayed filing the supplement and purportedly failed to follow a local rule. However, these arguments are without merit, and the realities of this litigation counsel in favor of permitting the Supplemental Complaint to be filed. As Defendants themselves have previously conceded, supplemental pleadings such as the one proposed by Plaintiffs here are designed "to avoid the risk of a 'separate, redundant lawsuit' dealing with the same issues." June 29, 2016 Opp'n to Suppl. Compl. at 25, ECF No. 285 (quoting *The Fund for Animals v. Hall*, 246 F.R.D. 53, 55 (D.D.C. 2007)). Indeed, "[t]he goal is to 'avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted.'" *Id.* (quoting *New Amsterdam Cas. Co. v. Waller*, 322 F.2d 20, 28 (4th Cir. 1963)). When "a supplemental pleading facilitates the efficient administration of justice, a court should allow it." *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D 397, 402 (E.D. Wis. 2008).

ARGUMENT

I. The Allegations in the Supplemental Complaint Are Timely and Permitting the Supplemental Complaint Will Avoid Duplicitous Litigation.

Defendants' arguments that Plaintiffs' Supplemental Complaint is unduly delayed fail. *See* Def.'s Opp'n at 2–3, ECF No. 343. Leave to file should not be denied due to a simple delay; rather, the delay must be "unjustifi[ed]," *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 868-69 (7th Cir. 2013), or "undue." *King v. Kramer*, 763 F.3d 635, 643-44 (7th Cir. 2014). For example, where the delay was caused by time spent litigating the case on appeal, a court in this district declined to find undue delay even though the amendment was filed three years after the first complaint. *U.S. ex rel. Heath v. Wis. Bell, Inc.*, 111 F. Supp. 3d 923, 929 (E.D. Wis. 2015). Another court in this circuit found that a delay was justified where it was caused by the "procedural oddities" of the case going back and forth between state and federal court. *Data Research & Handling, Inc. v. Vongphachanh*, No. 1:16-cv-392, 2017 WL 4340197, at *4 (N.D. Ind. Sept. 30, 2017).

As a preliminary matter, the Supplemental Complaint is timely and falls well within the statute of limitations. Plaintiffs' claims have a six-year limitations period. *See, e.g., Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (holding that Wisconsin's six-year personal rights statute of limitations applies to Section 1983 actions). Here, not only do the new allegations involve events relating to the November 2016 election, but they also involve the *continuing* inability of a class member and proposed named Plaintiff, Brenda Wells, to secure a permanent ID for voting, which indisputably remains timely.[1] In addition, Plaintiffs raise allegations

[1] Were Ms. Wells—or any other voter—to bring a separate lawsuit based upon these facts, the statute of limitations would not even run until 2022. This makes clear that filing a Supplemental Complaint based on these facts, which have occurred and continue to occur since 2016—*i.e.*,

concerning Defendants' ongoing arbitrary treatment of applicants for state ID cards and their ongoing failure to meaningfully educate Wisconsin voters on the voter ID law, which also are clearly timely.[2] And the Supplemental Complaint identifies and seeks to dismiss certain named Plaintiffs who have died, have moved or plan to move out of Wisconsin, or are ill.[3] Thus, Plaintiffs' Supplemental Complaint is timely.

Here, because the proposed Supplemental Complaint raises facts about *continuing* barriers for voters and because the matters raised fall well within the statute of limitations for such claims, any purported delay is not "undue." Indeed, the parties continue to wait for a Seventh Circuit decision on the pending appeal. *See* Ct. Mins. of Conference, ECF No. 333; Notice of Appeal, ECF No. 295; *Frank v. Walker*, No. 16-3003 (7th Cir.);[4] *cf. Wis. Bell*, 111 F. Supp. 3d at 929.

Defendants rely on *Soltys v. Costello*, 520 F.3d 737 (7th Cir. 2008), to argue that "[w]hile '[d]elay on its own is usually not reason enough for a court to deny a motion to amend . . . the

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within less than the past two years—is timely and does not constitute and undue or unjustified delay.

[2] These facts show Defendants' continuing arbitrary treatment of voters and continuing failure to meaningfully inform voters about the law's requirements, allegations raised in Count Seven and Count Eight of the Complaint. *See* Am. Compl. ¶¶ 169, 178, ECF No. 31; *see also id.* ¶¶ 60, 81-82.

[3] Defendants argue that a supplemental complaint should not be used to withdraw plaintiffs and that a full complaint is needed to "clarify" who is in the case. Def.'s Opp'n at 5, ECF No. 343. Defendants cite no legal authority for this proposition, which should be rejected. Should the Court prefer, however, Plaintiffs will file a formal motion requesting leave for these named Plaintiffs to withdraw from the litigation.

[4] Plaintiffs also note that Defendants have actually imposed delays on Plaintiffs' efforts to obtain information about Defendants' own ID issuance practices, by filing litigation in state court against the *Frank* Plaintiffs and Plaintiffs' counsel to prevent the use of information obtained in discovery in this case for contacting individual voters. *See Wisconsin Dept. of Transportation v. ACLU of Wisconsin et al.*, No. 17-cv-2639 (Dane Cty. Cir. Ct.); originally filed as No. 17-cv-184 (Pierce Cty. Cir. Ct., Sept. 19, 2017).

longer the delay, 'the greater the presumption against granting leave to amend.'" Def.'s Opp'n at 3, ECF No. 343 (quoting *Soltys*, 520 F.3d at 743). But *Soltys* is inapposite because in that case the undue delay occurred when plaintiff filed an amended complaint *two weeks before trial* and the court determined the defendant would be prejudiced. *Soltys*, 520 F.3d at 743. Similarly, in *Twin Disc Inc. v. Big Bud Tractor Inc*., 772 F.2d 1329, 1338 (7th Cir. 1985), the court denied leave to supplement the complaint because the request was made *one week before trial*. In stark contrast, this Court has not imposed any deadlines for continued litigation of this case, much less set a new trial date. And Defendants have not even attempted to argue prejudice. "[W]here [Defendant] would 'not [be] prejudiced in any legally relevant sense by the court's amendment,' and '[t]he equities . . . weight heavily in favor of the [movant],' a court should exercise its discretion to allow an amendment." *King*, 763 F.3d at 644 (quoting *Matter of Delagrange*, 820 F.2d 229, 233 (7th Cir. 1987)).

Defendants' argument that "[t]here must be a point at which a plaintiff makes a commitment to its theory of the case" likewise fails. Def.'s Opp'n at 3, ECF No. 343, (quoting *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1304 (7th Cir. 1993)). In *Johnson*, the plaintiff moved to amend the complaint in response to a summary judgment motion "to add a whole new theory of the case four years after this action was commenced, with no explanation as to why amendment did not take place sooner, except perhaps that plaintiff's attorney felt it was not necessary." *Johnson*, 10 F.3d at 1304. By contrast, here, there are no pending motions or even looming motion deadlines.

Moreover, Plaintiffs' theory of the case has remained unchanged, and nothing in the proposed Supplemental Complaint alters that. Despite Defendants' protests, Def.'s Opp'n at 2-3, ECF No. 343, Plaintiffs are actually responding to *Defendants'* ever-changing practices and

regulations surrounding the issuance of voter ID cards. *See, e.g.*, Prop. Suppl. Compl. ¶¶ 7, 10, 13, 16, ECF No. 342-1; Clearinghouse Rule CR 16-040, Wisconsin State Legislature (last visited Jan. 31, 2018), https://docs.legis.wisconsin.gov/code/chr/all/cr_16_040 (noting a May 2017 effective date for change to rules regarding state identification cards); *see also* Br. of Pls.-Appellees/Cross-Appellants at 8-13, *Frank v. Walker*, 16-3003, (7th Cir. Sept. 30, 2016), ECF No. 47 (describing the regulatory changes over the span of this litigation). In any case, there are no additional claims added at all. Instead, as noted above, Plaintiffs seek to add an additional, adversely affected, named Plaintiff, class member, Brenda Wells; dismiss persons who died or are no longer affected; and add additional *facts* to show Defendants' continuing violations of previously pled claims. Prop. Suppl. Compl. ¶¶ 2-17, ECF No. 342-1.

Because Plaintiffs' allegations relate to recent and continuing conduct, the case has largely been paused for the last year, and there are no deadlines at issue, the Court should reject Defendants' argument that Plaintiffs have unduly delayed in supplementing the Complaint.

II. Civil Local Rule 15(a) Does Not Apply to Plaintiffs' Supplemental Complaint.

Defendants also argue that Plaintiffs' motion should be denied because they failed to reproduce the underlying pleading. Def.'s Opp'n at 4–5, ECF No. 343. But this requirement only applies to motions to amend pleadings under Local Rule 15(a), not to supplement pleadings under Local Rule 15(c). *See* E.D. Wis. Civ. L.R. 15(a) ("Any *amendment to a pleading*, whether filed as a matter of course *or upon a motion to amend*, must reproduce the entire pleading *as amended.*") (emphases added). The Committee Comment provides further that Local Rule 15(a) is "intended to end confusion surrounding the filing and service requirements *in connection with successful motions for leave to amend pleadings*" and, for this reason, the "*proposed amended pleading* should be attached to the *motion to amend.*" *Id.* (emphases added). The requirement

that the entire complaint be reproduced "as amended" makes practical sense in the case of an *amendment* to the pleading, because "an amended pleading relates to matters that occurred prior to the filing of the original pleading and entirely replaces the pleading." *Habitat Educ. Ctr., Inc.*, 250 F.R.D at 401. By contrast, a supplemental pleading—such as that which Plaintiffs wish to file—does not replace the original pleading but "addresses events occurring subsequent to the initial pleading and *adds* to such a pleading." *Id.* (emphasis added). Thus, any confusion that might arise from seeking to amend a pleading without reproducing the entire document does not exist when the plaintiffs seek only to add an additional party and additional relevant facts.

Defendants cite *McDaniel v. Meisner*, No. 12-cv-1178, 2014 WL 1908620 (E.D. Wis. May 13, 2014), for the proposition that Local Rule 15(a) applies to supplementation of the complaint. Def.'s Opp'n at 4, ECF No. 343. While the court in that case used the word "supplement," it is clear that it was contemplating an amended complaint when it addressed Civil Local Rule 15. *See id.* at *2 ("If McDaniel intended to supplement his complaint with the claims set forth in the forms, *he did not follow the procedure for amending complaints* set forth in Civil Local Rule 15, and his motion will be denied.") (emphasis added). A later decision in the same case, *McDaniel v. Meisner*, No. 14-cv-53, 2014 WL 4546531 (E.D. Wis. Sept. 12, 2014), confirms that the court contemplated an amended complaint, not a supplemental complaint; that it was an amended complaint that had to comply with Local Rule 15; and that an amended complaint was the proper vehicle to assert new *claims*, not just new facts. *See id*. at *4 ("If McDaniel wants to amend his complaint to include new, related claims, he must follow the procedure set forth in Federal Rule of Civil Procedure 15(a) and Civil Local Rule 15 and file a

motion for leave to amend his complaint, as well as a complete amended complaint that includes all of his claims against all of the defendants.").[5]

Even if Civil Local Rule 15(a) were to apply, this Court should "exercise [its] discretion in a more lenient direction." *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir. 2013) (upholding district court's decision to enter summary judgment in favor of plaintiff over defendants' objection that plaintiff failed to strictly comply with the civil local rules governing summary judgment motions); *see Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 770 (7th Cir. 2013) (noting that the district court's "broad discretion" in enforcing its local rules includes the discretion to "relax the rules and excuse noncompliance"). Indeed, "unless the district court 'enforce[s] (or relax[es]) the rules unequally as between the parties,' the decision to 'overlook any transgression [of the local rules] is left to the district court's discretion.'" *Modrowski*, 712 F.3d at 1169 (quoting *Stevo v. Frasor*, 662 F.3d 880, 887 (7th Cir. 2011)). In fact, in *Cherry v. Eckstein*, No. 16-cv-1695, 2017 WL 318824, at *1 (E.D. Wis. Jan. 23, 2017), on which Defendants rely (Def.'s Opp'n at 4, ECF No. 343), a court in this district exercised its discretion to consider the movant's supplemental habeas petition on the merits, despite the movant's failure to conform his petition to the technical requirements of Civil Local Rule 15(a). The Seventh Circuit has also made clear "litigants have no right to demand strict enforcement of local rules by district judges." *Modrowski*, 712 F.3d at 1169.

[5] In any event, the considerations informing the court's decision to bind the *McDaniel* plaintiff to the technical requirements of Civil Local Rule 15(a) are not present here. There, the plaintiff sought to supplement his complaint by filing two Wisconsin State Notice of Injury and Claim forms, which the court declined to consider because there was "nothing in them for [the] Court to decide." *McDaniel v. Meisner*, No. 12-cv-1178, 2014 WL 1908620, at *2 (E.D. Wis. May 13, 2014). In its subsequent decision in the same case, the court noted that "[plaintiff's] addenda d[id] not properly supplement or amend" the complaint, and several claims plaintiff sought to assert were "not sufficiently related to [the] original claims." *McDaniel v. Meisner*, No. 14-cv-53, 2014 WL 4546531, at *4 (E.D. Wis. Sept. 12, 2014). Those concerns are not present here.

CONCLUSION

Because it would be most efficient to litigate these claims "as part of a single action," *Frank v. Walker*, 196 F. Supp. 3d 893, 899 (E.D. Wis. 2016), the Court should permit the filing of Plaintiffs' proposed Supplemental Complaint.

Dated this 1st day of February 2018,
Respectfully submitted,

/s/ Karyn L. Rotker

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General Information

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