



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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VIA ECF

The Honorable Lynn Adelman
362 United States District Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: *Frank, et al. v. Walker, et al.*, Case No. 11-cv-1128
Status Conference on June 7, 2016

Dear Judge Adelman:

At the June 7, 2016 status conference, we would like to address three issues: (1) the status of the *One Wisconsin*¹ case in the Western District, and Defendants' request that proceedings in this case be stayed pending a ruling in *One Wisconsin*; (2) if no stay is issued, the need for discovery on facts relevant to class certification and further briefing on the pending class certification motion; and (3) a schedule for discovery on the merits if class certification is granted, consistent with the Seventh Circuit's instruction that "[t]he district court should permit the parties to explore how the state's system works today before taking up plaintiffs' remaining substantive contentions." *Frank v. Walker*, 2016 WL 1426486, at *4 (7th Cir. Apr. 12, 2016).

As you know, the *One Wisconsin* case pending in the Western District involves claims of barriers to obtaining photo identification, allegations that are identical to those made by Plaintiffs in this case. Indeed, the plaintiffs here have asked to prosecute this case based on discovery from *One Wisconsin*. The *One Wisconsin* trial is now complete, and a ruling is expected by the end of July. In light of that timeline, and the essentially complete overlap of facts and legal issues, it makes sense to hold in abeyance further proceedings in this case pending a decision in *One Wisconsin*.

¹ *One Wisconsin Institute, Inc. et al. v. Nichol et al.*, 15-CV-324 (W.D. Wis.).

In the absence of a stay, this Court should permit Defendants to take discovery of class representatives and then schedule briefing on Plaintiffs' request for class certification prior to briefing on the merits of the case. Resolution of the class certification question is necessary to establish the scope of the remaining claims, and to defend those claims.

Plaintiffs requested class certification, along with an injunction and judgment on remaining as-applied claims, on March 26, 2015.² (Dkt. 222.) Defendants opposed all the requested relief, and briefed the issue of class certification. (Dkt. 228:5–12.) The Court denied the request for class certification, in part because the Seventh Circuit barred further consideration of the class's claims. (Dkt. 250:3, 20.) That decision was appealed, and the Seventh Circuit remanded in part. *Frank*, 2016 WL 1426486 at *4.

The Seventh Circuit held that it did not previously rule on the circumstances of individuals who allege they are unable to get a photo ID. *Id.* at *2. The court discussed this issue in terms of three possible classes:

Plaintiffs want relief for three classes of persons: (1) eligible voters unable to obtain acceptable photo ID with reasonable expense and effort because of name mismatches or other errors in birth certificates or other necessary documents; (2) eligible voters who need a credential from some other agency (such as the Social Security Administration) that will not issue the credential unless Wisconsin's Department of Motor Vehicles first issues a photo ID, which the DMV won't do until the other credential has been obtained; (3) eligible voters who need a document that no longer exists (such as a birth certificate issued by an agency whose records have been lost in a fire).

Id. at *1.

These potential classes are not currently certified. Defendants do not believe that Plaintiffs can meet Rule 23 requirements. Before proceedings can meaningfully continue, we respectfully submit that the Court should permit discovery on class certification, enter a briefing schedule, and then enter an order either certifying or

² This was the second request for class certification. Plaintiffs first requested class certification on April 23, 2012. (Dkt. 63.) While that request was pending, a ten-day trial was held in November, 2013. (Dkt. 165, 166–71.) This Court ordered a permanent injunction, and denied the class certification request as moot because “all members of the proposed classes will benefit from the permanent injunction whether or not classes are certified.” (Dkt. 195:69.)

denying class certification.³ If Plaintiffs cannot meet Rule 23, this case will stop there. Alternatively, classes and class representatives, need to be defined in order to defend this case and to tailor any relief that the Court may grant.

If a class were to be certified, then additional discovery on the merits will be necessary. First, the applicable law has changed since previous discovery in this case, and new administrative rules bear directly on this controversy. Wis. EmR1618.⁴ DOT now issues photo receipts to persons applying for an ID card. *Id.* at § 10. This receipt is a photo ID that is valid for voting, and it may be submitted to other jurisdictions in support of a request for identity documents. The rule also clarifies the circumstances where a person can get an ID despite not having certain documents. *Id.* at § 8. Defendants must have an opportunity to discover how this new law affects representatives of any certified class in order to defend the case.

Second, four years have passed since the trial, and the circumstances of any potential class representative may have changed. Some may have IDs now, and some may have voted in elections where the challenged laws were in effect. Indeed, Defendants have reason to believe that the lead Plaintiff in this case voted in February and April 2016. Defendants need an opportunity to make inquiries into facts such as these, which could be critical to the outcome of the case.

Thank you for taking the time to discuss these issues with the parties at the upcoming conference.

Sincerely,

/s/S. Michael Murphy

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³ *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) (“On issues affecting class certification . . . a court may not simply assume the truth of the matters as asserted by the plaintiff. If there are material factual disputes, the court must ‘receive evidence ... and resolve the disputes before deciding whether to certify the class.’”) (quoting *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)).

⁴ Available at:
https://docs.legis.wisconsin.gov/code/register/2016/725A3/register/emr/emr1618_rule_text/emr1618_rule_text (Last visited on June 6, 2016.)