

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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RUTHELLE FRANK, *et al.*,

Plaintiffs,

v.

Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

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**Defendants' Civil Local Rule 7(h) Expedited Non-dispositive  
Motion to Strike Plaintiffs' Evidence Filed on Reply  
and to Strike Portions of Plaintiffs' Reply Brief**

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Pursuant to Civil Local Rule 7(h), Defendants respectfully move the Court for an order striking Plaintiffs' evidence filed with their reply brief and striking portions of the reply brief from the district court record. Specifically, Defendants request that the Court strike docket entries 238-1 through 238-8 and 238-14 through 238-22 from the district court record and strike all portions of Plaintiffs' reply brief that rely upon such evidence.

This Court has described the filing of new evidence with a reply brief as "sandbagging." *Shurr v. A.R. Siegler, Inc.*, 70 F.Supp.2d 900, 912 (E.D. Wis. 1999) (Adelman, J.). Such litigation tactics are inappropriate because of the basic principle that arguments raised for the first time on reply are waived. *See, e.g., Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005), *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 586 (7th Cir. 1999).

With their reply brief, Plaintiffs have filed an attorney declaration that attaches as exhibits several new witness declarations, website excerpts, and other materials that are being presented by Plaintiffs to the Court for the first time. (*See* Dkt. 238; Dkts. 238-1 through 238-8; Dkts. 238-14 through 238-22.) Plaintiffs provide no reason why they did not file this evidence with their opening brief in support of their pending motions, and it would have made sense to do so.<sup>1</sup> As Defendants pointed out in their brief in opposition, Plaintiffs' pending motions should be denied because of standing problems, Rule 23 class certification defects, and other impediments to granting the relief requested. (Dkt. 228.)

Plaintiffs have filed their new evidence on reply to make new arguments in support of their motions and, in particular, to support their class certification motion. For the first time on reply, Plaintiffs argue that previously unidentified individuals can substitute for named Plaintiff class representatives who no longer satisfy the requirements of Rule 23. (*See* Dkt. 237:1-2, 18-20.) Plaintiffs' new evidence seeks to support the new argument that previously unidentified potential class representatives exist who could fill in for the Plaintiffs who have qualifying ID. Plaintiffs could have come forth with these "potential plaintiffs" when they filed their instant motions. Or Plaintiffs could have filed a motion for leave to amend their complaint to add parties. Instead, Plaintiffs lay in the weeds to spring this new evidence on reply. The Court should strike the new evidence from the record

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<sup>1</sup>Some of Plaintiffs' new declarations were executed in April 2015. (*See* Dkts. 238-1, 238-2, 238-5, 238-6, 238-7.) One declaration was executed one week before the April 24, 2015, deadline for Defendants to file their brief in opposition. (*See* Dkt. 238-1:2.)

because Plaintiffs have waived their right to present new evidence and new arguments on reply. *See Harper* 433 F.3d at 528; *Coker*, 165 F.3d at 586.

WHEREFORE, Defendants respectfully request that the Court grant their instant motion and enter an order striking docket entries 238-1 through 238-8 and 238-14 through 238-22 from the district court record and striking all portions of Plaintiffs' reply brief that rely upon such evidence.

Dated this 27th day of May, 2015.

Respectfully submitted,

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## 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
<b>Status</b>	Closed