STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 2

ANTRELL THOMAS, et al.,

Plaintiffs,

v. Case No. 22-CV-1027

ANTHONY S. EVERS, in his official capacity as the Governor of Wisconsin, et al.,

Defendants.

DEFENDANTS' RESPONSE OPPOSING MOTION FOR PARTICULARIZED DISCOVERY

This Court should deny Plaintiffs' motion for particularized discovery, Doc. 109. There are several reasons why the motion does not show "good cause" that "particularized discovery is necessary," Wis. Stat. § 802.06(1)(b), as the parties await this Court's forthcoming decision on pending motions to dismiss and for class certification.

First, this Court should deny the motion outright because Plaintiffs did not follow this Court's rules. Brown County Circuit Court Local Rule 405, which addresses discovery motions, states in relevant part:

> a. Good Faith Effort to Resolve. All motions to compel discovery pursuant to Chapter 804 Wis. Stats. must be accompanied by a statement in writing by the movant that after consultation with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach an accord. Such statement shall recite the date, place, and name of all parties participating in such conference.

Brown Cnty. L. R. 405 a. Because Plaintiffs' counsel did not consult with defense counsel before filing their motion, they could not include any statement

in it about a consultation, when it occurred, or who participated. There was no good faith effort made by Plaintiffs to resolve this issue.

Second, Plaintiffs' motion is contradictory and shows an effort to shore up what they now apparently believe was an insufficient presentation as to class certification. They first argue that "class discovery is unnecessary given the judicially noticeable evidence provided and the public record," (Doc. 109:2), yet their table showing each proposed discovery "Request" and "Why Necessary" indicates that many of the requests are meant to obtain information to support class certification (Doc. 109:3, 4 ("resolve any existing doubts about whether numerosity is satisfied"), ("supports a finding of numerosity"), ("tend to support a finding of commonality"), ("support the finding of typicality and commonality")). It is not the time for discovery of class-certification evidence after their motion is fully briefed and awaiting disposition.

Third, Plaintiffs waited an unreasonably long time to file their motion, and it is unclear why the motion should be taken up now. The 180-day discovery stay under Wis. Stat. § 802.06(1)(b) expires approximately at the end of July based upon the January 30, 2023, filing of Defendants' motion to dismiss. (Doc. 57.) And 90 days from the April 17, 2023, date that the motions to dismiss and for class certification were fully briefed is July 17, 2023. *See* Wis. Sup. Ct. R. 70.36(1)(a) ("Every judge of a circuit court shall decide

each matter submitted for decision within 90 days of the date on which the matter is submitted to the judge in final form, exclusive of the time the judge has been actually disabled by sickness."). Plaintiffs' motion makes little sense when this Court is poised to soon dispose of the pending, critical motions and, if it does not, the discovery stay will expire.

Plaintiffs could have raised these issues at any time after they served their discovery in September 2022. (*See* Doc. 109:2.) They could have raised them at the February 8, 2023, scheduling conference. (Doc. 75 (transcript).) Yet they waited until months after motions to dismiss and for class certification were fully briefed to raise their "need" for discovery. This is needless sandbagging. Nothing has changed since the discovery was served.

Lastly, the proposed discovery would be unduly burdensome for Defendants in comparison to its necessity or benefit to Plaintiffs and their claims. *See* Wis. Stat. § 804.01(2)(am)2. (a court may limit discovery if "[t]he burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue"). The proposed requests are for "[a]ll documents" and "[a]ll [c]ommunications" as to certain topics. (Doc. 109:3, 4.) Responding completely to the requests at an agency as expansive as the Office of the State Public Defender will involve searches by hundreds of people across dozens of offices involving many thousands of documents and e-mail messages. Plaintiffs do not explain why this is necessary now, or ever.

Ultimately, it is not clear why *any* discovery would be needed in this case. Plaintiffs' case involves a legal question: does the state or federal constitution require an indigent criminal defendant to be appointed counsel within 14 days of his initial appearance? (*See* Doc. 66:6, 12, 14; 48 ¶¶ 28, 30.a., 72, 107, 125, 129, 132.) There is a "yes" or "no" answer to that question that does not require discovery. It involves applying the state and federal constitutions and cases interpreting them to a static, given fact. Nor does discovery become necessary when the hypothetical time frame is 30, 60, or 120 days from the initial appearance. (*See* Doc. 66:6, 14; 48 ¶¶ 108–10.) Discovery simply is not necessary to resolve the merits of Plaintiffs' claims, if they are not first dismissed, as they should be.

This Court should deny the motion for particularized discovery.

Dated this 6th day of July 2023.

Respectfully submitted,

JOSHUA L. KAUL
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Electronically signed by:

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendants' Response Opposing Motion for Particularized Discovery with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of July 2023.

Electronically signed by:

Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General