

**FILED**  
**03-14-2024**  
**Clerk of Circuit Court**  
**Brown County, WI**  
**2022CV001027**

BY THE COURT:

DATE SIGNED: March 14, 2024

Electronically signed by Thomas J. Walsh  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH II

BROWN COUNTY

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ANTRELL THOMAS, et al.,

Plaintiffs,

v.

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

Case No. 22CV1027

Defendant.

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### **DECISION AND ORDER**

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Before the Court is a motion to compel discovery from Plaintiffs. Because the Court denied Plaintiffs' motion for class certification without prejudice, Plaintiffs now move to compel discovery of information related to class certification so that class certification may be revisited with a fuller evidentiary record. Defendants oppose Plaintiffs' motion. For the following reasons, Plaintiffs' motion will be **GRANTED in part** and **DENIED in part**.

### **PROCEDURAL BACKGROUND**

Plaintiffs originally moved to certify a class that included “[a]ll past, current, and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 14 days of their initial appearances.” (Doc. 66:10.) In the alternative, Plaintiffs proposed three subclasses of similarly situated criminal

defendants. (*Id.*) In a decision and order filed September 21, 2023, the Court denied Plaintiffs' motion for class certification. (Doc. 118:1.) The Court specifically found that Plaintiffs failed to satisfy the numerosity and commonality requirements. (*Id.* at 3–6.) Also on September 21, 2023, the Court granted in part and denied in part Defendants' motion to dismiss Plaintiffs' amended complaint. (Doc. 119.) That same day, Plaintiffs state that Defendants served their responses to Plaintiffs' first set of interrogatories and requests for production of documents. The parties disagreed as to the sufficiency of Defendants' responses, and their mutual attempts to resolve their differences over the discovery responses were unsuccessful.

Plaintiffs now move to compel Defendants to produce documents responsive to their requests to produce numbers 1 through 3 and answers to interrogatories numbers 1 and 2. As a threshold matter, Plaintiffs argue they are entitled to revisit class certification because the law allows as much, and because their motion to certify was denied without prejudice. Because class certification can be taken up again, Plaintiffs argue the discovery materials they seek are relevant and necessary to this litigation. Defendants argue that this motion to compel should be denied because the Court properly denied Plaintiffs' motion to certify, and Plaintiffs did not seek reconsideration or an appeal of that decision. Defendants also argue that the requests are unduly burdensome and not proportional to the needs of the case.

## ANALYSIS

### I. Motion to compel discovery

Litigants may obtain discovery materials many ways, including by written interrogatories and requests for production of documents. WIS. STAT. § 804.01(1) (2021–22).<sup>1</sup> Litigants generally “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021–22 version.

defense and proportional to the needs of the case, considering the importance of the issues at stake in the action.” § 804.01(2)(a). The trial court should also consider “the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* The court may limit the scope of discovery if the “discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” § 804.01(2)(am)1. Discovery may also be limited when the “burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case.” § 804.01(2)(am)2.

“Motions to compel discovery are matters within the trial court’s discretion.” *Alt v. Cline*, 215 Wis. 2d 204, 216, 572 N.W.2d 895 (Ct. App. 1997) (citing *Franzen v. Children’s Hosp. of Wis., Inc.*, 169 Wis. 2d 366, 376, 485 N.W.2d 603 (Ct. App. 1992)); *see also Lane v. Sharp Packaging Sys.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W.2d 788. A trial court properly exercises its discretion by examining the relevant facts, applying a proper standard of law, and using an ostensibly rational process, to reach a conclusion that a reasonable judge could reach. *Lane*, 251 Wis. 2d 68, ¶ 19.

**a. Plaintiffs can revisit class certification**

Wisconsin’s class action statute provides that “[a]n order that grants or denies class certification may be altered or amended before final judgment.” WIS. STAT. § 803.08(3)(c); *see also Hammett v. Verisma Sys., Inc.*, 2021 WI App 53, ¶ 27, 399 Wis. 2d 211, 963 N.W.2d 874 (explaining that after merits discovery “the circuit court retains the authority and discretion under [section] 803.08(3)(c) to alter or amend the scope of the certified [c]lass at any time before final judgment”); *Fotusky v. ProHealth Care, Inc.*, 2023 WI App 19, ¶ 38, 407 Wis. 2d 554, 991 N.W.2d

502 (Neubauer, J., concurring) (noting that section 803.08(3)(c) allows the trial court to refine the class rather than simply denying the class certification because the class definition is overbroad).

**b. The subject discovery requests**

Interrogatory 1 is as follows:

Please identify every Eligible Defendant, who has had an Initial Appearance during the Class Period but was not appointed counsel by the State Public Defender even though 14 or more days passed since the Eligible Defendant's first Initial Appearance. In answering this Interrogatory, please identify (1) the Eligible Defendant's name; (2) the Eligible Defendant's case number; (3) the county where the Eligible Defendant's case was pending; (4) the nature of the charges against the Eligible Defendant; (5) the location at which the Eligible Defendant was being held in custody, if applicable; (6) the date of the Eligible Defendant's first Initial Appearance; and (7) the number of days it took to appoint the Eligible Defendant counsel after the Eligible Defendant's first Initial Appearance, if applicable.

Interrogatory 2 is as follows:

For each Eligible Defendant identified in Interrogatory 1 who still has not been appointed counsel as of the date of Your response, please identify each Eligible Defendant who still has not been appointed counsel even though 14 or more days passed since the Eligible Defendant's first Initial Appearance. In answering this Interrogatory, please identify (1) the Eligible Defendant's name; (2) the Eligible Defendant's case number; (3) the county where the Eligible Defendant's case is pending; (4) the nature of the charges against the Eligible Defendant; (5) the location at which the Eligible Defendant is being held in custody, if applicable; and (6) the date of the Eligible Defendant's first Initial Appearance.

Request for production of documents 1 is as follows:

Please produce all documents showing the number of Eligible Defendants who were not appointed a lawyer within 14 days of their Initial Appearance during the Relevant Time Period.

Request for production of documents 2 is as follows:

Please produce all documents showing the Eligible Defendants who, as of the date of your response, still have not been appointed a lawyer within 14 days of their Initial Appearance during the Relevant Time Period.

Request for production of documents 3 is as follows:

In an interview published on April 17, 2022, Defendant Kelli Thompson stated: “We are getting business done. So we’re running thousands of cases through our criminal justice system and probably somewhere between 80% of our cases are appointed within the first 10 days of a case.” Please provide all documents showing the percentage of cases for which the State Public Defender appoints counsel to a qualified Eligible Defendant within the first 10 days of the Eligible Defendant’s Initial Appearance.

(Suber Decl. Exs. A & B.)

**c. Discussion**

As Plaintiffs point out in their briefing, the Court’s phrasing all but invited further inquiry into the numerosity prerequisite. (Doc. 118:4–5.) The Court was less inviting regarding the commonality prerequisite. The Court stated that “[t]he central question to the Plaintiffs’ and each proposed class members’ claim is whether the delay they experienced was unreasonable.” (*Id.* at 6.) It is accurate that the Court stated the answer to that question “may not generate a common answer as the delays in some cases may be reasonable while delays in other cases may be unreasonable.” (*Id.*) However, the Court concluded that because each Plaintiffs’ and each prospective class members’ cases presented different answers to the reasonability question—i.e., dissimilarities within this proposed class which “impede the generation of common answers”—their claims “do not depend on a common contention that can be resolved ‘in one stroke.’” (*Id.* at 5, 6.)

In sum, the Court’s skepticism that the commonality prerequisite could ever be satisfied showed in that decision and order. The Court is presently mindful that Plaintiffs’ response to such doubt is that they need this discovery to allay the Court’s concern. On the other hand, Defendants urge this Court to deny Plaintiffs’ motion because the Court’s class certification decision was correct. The Court is mindful of the grave importance of this case, but at the same time questions whether more discovery will assist Plaintiffs with the commonality prerequisite, and whether

actual resolution of the problems underlying these claims will spring from a class action initiated in the circuit court system. The Court also gives much consideration to the strain that the discovery requests as they stand would put on the SPD's limited resources when Plaintiffs could obtain much of the information themselves through available public resources, such as CCAP, the Department of Corrections' website, and county jail inmate search engines.

The Court thus concludes that the discovery requests as written are not proportional to the needs of the case. The factors the Court gives the most weight to are the burden on the State in responding to the requests and the unlikelihood that the materials will assist Plaintiffs in resolving their claims in the form of a class action. The Court will, however, compel discovery of (1) the Eligible Defendant's name; (2) the Eligible Defendant's case number; and (3) the county where the Eligible Defendant's case was pending during the class period, which the Court understands to be on or after January 1, 2019. Any information beyond these three points will have to be obtained and organized/analyzed by Plaintiffs using public information sources. Plaintiffs' requests to compel Defendants to produce and organize such information are denied.

### **CONCLUSION AND ORDER**

Based on the foregoing, it is hereby **ORDERED** that Plaintiffs' motion to compel discovery is **GRANTED** to the following extent: Defendants will produce (1) the Eligible Defendant's name; (2) the Eligible Defendant's case number; and (3) the county where the Eligible Defendant's case was pending during the class period, which the Court understands to be on or after January 1, 2019.

Plaintiffs' motion to compel is otherwise **DENIED**.