STATE OF WISCONSIN **CIRCUIT COURT** **BROWN COUNTY**

ANTRELL THOMAS, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No. 2022-CV-1027

Hon. Thomas J. Walsh

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Wisconsin's public defense system has forced Plaintiffs, along with thousands of other indigent Defendants, to wait weeks, months, and, in some cases, over a year for an attorney. Plaintiffs have sought judicial intervention on behalf of themselves and all others similarly situated and are seeking discovery into the scope and depth of the public defense crisis in Wisconsin.

The primary issue here revolves around discovery into issues related to class certification. While the Court denied Plaintiffs' Motion for Class Certification, it did not do so with prejudice. Given this, and under established law, Plaintiffs are entitled to discovery into their class allegations so that, once discovery has closed, the Court can revisit class certification with a complete evidentiary record. Defendants disagree, and they have refused to respond to requests for discovery into these class allegations. In fact, Defendants have improperly objected to discovery on multiple grounds. In light of this, Plaintiffs respectfully request that this Court grant their Motion to Compel Discovery.

BACKGROUND

Plaintiffs first served discovery requests on Defendants on September 30, 2022. Defendants refused to respond, however, citing the pending Motion to Dismiss and Class Certification Motion.

On September 21, the Court granted in part Defendants' Motion to Dismiss and denied Plaintiffs' Motion for Class Certification. ECF 118, 119. That same day, Defendants served their responses to Plaintiffs' First Set of Interrogatories and First Set of Requests to Produce Documents. Suber Decl., **Ex. A**, Defs.' Resp. to Pls.' ROGs; Suber Decl., **Ex. B**, Defs.' Resp. to Pls.' RFPs. Plaintiffs identified multiple deficiencies with Defendants' discovery responses and, on September 29, 2023, counsel for Plaintiffs and Defendants met and conferred to discuss Plaintiffs' concerns about Defendants' discovery responses and attempt in good faith to resolve their differences. The parties were unable to come to an agreement as to many issues and Plaintiffs now move to compel Defendants to produce documents responsive to Request for Production Nos. 1-3 and answer Interrogatory Nos. 1-2.

ARGUMENT

I. Legal Standard

Under Wis. Stat. § 804.01(2)(a), Plaintiffs are entitled to discovery on "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." For discovery, relevancy is broad and construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Murillo v. Kohl's Corp.,* 2016 WL 4705550, at *2 (E.D. Wis. Sept. 8, 2016) (internal citations omitted). Further, for good cause, "the court may order discovery of any matter relevant to the subject matter involved in the action." *Drake v. Aerotek, Inc.*, 2014 WL 7408715 (W.D. Wis. Dec. 30, 2014).

II. Plaintiffs are Entitled to Discovery into Issues Regarding Class Certification

Now that discovery is open, the Court should compel discovery on class issues so the Court can make a fully informed determination whether this case is suitable for class treatment. Defendants objected to many discovery requests by arguing that "this case is not proceeding as a class action [and] the requested information is not relevant to the merits of the case." **Ex. A**, Defs.' Responses to Pls' ROGs Nos. 1-2; **Ex. B**, Defs.' Responses to Pls.' RFPs Nos. 1-2. But this position is misguided and

unjust because the Court did not deny Plaintiffs' class-certification motion with prejudice and, under established law, Plaintiffs can file a renewed motion now that discovery is open. Indeed, that is why the governing class action "Rule . . . permits the Court to alter or amend [a class certification] determination 'if, ***upon fuller development of the facts***, the original determination appears unsound.'" *Gardner v. First Am. Title Ins. Co.*, 218 F.R.D. 216, 217 (D. Minn. 2003) (quoting Fed. R. Civ. P. 23(c)(1) advisory committee's note) (emphasis added). There has been no discovery on class issues. And even though Plaintiffs felt that this class was suitable for class treatment on its face, at most this Court's pre-discovery class-certification ruling only showed that the Court is aligned with other Wisconsin courts that have noted that, "to properly decide class certification, 'discovery is often appropriate, even necessary.'" *Bruzek v. Husky Energy, Inc.*, 2019 WL 4855072, at *6 (W.D. Wis. Sept. 30, 2019).

Wisconsin Statute § 803.08(3)(c) states that "[a]n order that grants or denies class certification may be altered or amended before final judgment." This is similar to the federal counterpart for class actions, which is at Rule 23(c)(1)(C) of the Federal Rules and states that "[a]n order that grants or denies class certification may be altered or amended before final judgment." The similarity of these provisions is no coincidence because Wisconsin's revised class action statute is modeled after the federal rules, and the Wisconsin rule "directed Wisconsin courts to look to federal case law for guidance." *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶¶ 5, 21, 388 Wis. 2d 546, 933 N.W.2d 654 (noting the Judicial Council stated its "intent was to craft a Wisconsin class action rule that tracks as closely as possible federal practice so that Wisconsin courts and practitioners can look to the well-developed body of federal case law interpreting [Federal Rule of Civil Procedure] 23 for guidance.").

The "Supreme Court has stated that when a court denies certification of a class it would expect that court to reassess and revise such an order in response to events 'occurring in the ordinary course of litigation.'" *Dukes v. Wal-Mart Stores, Inc.*, 2012 WL 4329009, at *4 (N.D. Cal. Sept. 21, 2012) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 277 (1988)). "[I]t is not uncommon for

district courts to permit renewed certification motions that set out a narrower class definition or that rely upon different evidence or legal theories." *Id.* (citing *The Apple iPod iTunes Antitrust Litig.,* 2011 WL 5864036, at *1–2, *4 (N.D. Cal. Nov. 22, 2011)). Indeed, given the rules, a district court, like this Court, is "charged with the duty of monitoring its class decision in light of the ***evidentiary development*** of the case." *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983) (emphasis added).

This Court can benefit from additional discovery and a fuller development of the facts because a developed factual record will permit Plaintiffs to provide more detailed explanations while applying the facts to the law, which may cure the defects earlier found by the Court. For example, the Court noted that it could not find that Plaintiffs satisfied the numerosity requirement "without more evidence of class members" in all of Wisconsin's counties starting in 2019. *See* Doc. 118, Order at 4–5. So, through discovery, Plaintiffs will be able to gather evidence that will clarify that numerosity is satisfied for the proposed class. *Cf. Connolly v. Alltran Fin., LP*, 2019 U.S. Dist. LEXIS 150378, at *2 (E.D. Wis. Sept. 4, 2019) ("It is well settled that a plaintiff seeking class certification is entitled to discovery on the size of a prospective class."). Plaintiffs could not previously obtain this information, and still cannot obtain this information, given that it is uniquely in the possession of Defendants.

The Court also found that Plaintiffs failed to satisfy the commonality requirement because the answer to the central question in this case "***may*** not generate a common answer as the delays in some cases ***may*** be reasonable while delays in other case ***may*** be unreasonable." Doc. 118, Class Cert. Order at 6 (emphases added). But the inverse is also true: the answer to the central question may also have a common answer as the delays in all cases may be unreasonable based on the Defendants' written (and unwritten) policies and practices. That is why discovery is needed. Plaintiffs should be afforded the basic opportunity to fully explore this in discovery so that the Court may, in the future, consider all the documentary, testimonial, and expert evidence that Plaintiffs intend to proffer.

Plaintiffs only "filed general discovery requests on September 30th of 2022," and "none of it was tailored specifically to class certification." Doc. 117, 08.25.2023 H'rg Tr. at 14:2–12. Defendants acknowledged this, agreeing that class certification was "not what the general discovery that was served in September was all about." *Id.* 18:15–25. Given this, denying Plaintiffs the well-established opportunity to prove that this case is suitable for class certification through discovery of class issues and a renewed class-certification would work a manifest injustice in this case that the Court found is subject to "the great public importance exception" because the issues related to class certification are "of great public importance." Doc. 119, Order at 13, 14. This Court should therefore compel class discovery.

III. Plaintiffs' Requests are Relevant and Necessary

Defendants' main objection to all the discovery requests was that the discovery was irrelevant, burdensome, and unnecessary, in Defendants' view. But this is insufficient at this stage. All the propounded discovery is necessary and relevant to Plaintiffs' claims. For example, RFP Nos. 1-3 are straight forward and seek information related to the number of criminal defendants who, in the relevant time period—since January 1, 2019—faced delays of 14 days or more in receiving appointed counsel by the Wisconsin State Public Defender. Suber Decl., **Ex. B**. That is what this case is about.

The scope of Plaintiffs' claims necessarily encompasses the *reasons* for such delays. Courts have held as much in analogous constitutional contexts. *See, e.g.*, *Ireland v. Prummell*, 53 F.4th 1274, 1288 (11th Cir. 2022) ("[I]n making the determination of whether any particular delay is unconstitutional, the applicable court must consider 'the reason for the delay and the nature of the medical need.'"). The systemic context is critical to the determination of whether the delays in appointing counsel to Plaintiffs are reasonable. Indeed, the Court cannot assess reasonableness without understanding Defendants' policies, practices, and administration of the system as to other indigent criminal defendants. The nature and scope of the problem is inherent to Plaintiffs' individual claims.

IV. Defendants' Remaining Objections are Improper

Defendants' ancillary objections are also misguided, disingenuous, or both. In response to many of the discovery requests, Defendants argue that the requests are some combination of (1) unduly burdensome and not proportional to the needs of the case, (2) seeking information protected by attorney-client privilege or work product doctrine or related privileges, (3) seeking information that is publicly available and/or equally available to Plaintiffs, and (4) seeking information that is not important to resolving the issues in the case. These objections are all without merit.

A. The Requests are Proportional to the Needs of the Case

Defendants argue that certain requests are burdensome and not proportional because they "ask[] Defendants to compile information that is not in a centralized location within their records, that is kept by numerous satellite offices and custodians statewide, and that is not readily accessible or ascertainable." **Ex. A**, Resp. to ROGs Nos. 1-2; **Ex. B**, Resp. to RFPs Nos. 1-2. But just because the information may be kept in multiple different locations does not render the discovery requests *unduly* burdensome or not proportional. "All interrogatories are [] burdensome and expensive to some degree." *Vincent & Vincent, Inc. v. Spacek*, 102 Wis. 2d 266, 272, 306 N.W.2d 85, 88 (Ct. App. 1981).

B. Wisconsin Statute § 977.09 Does Not Render Documents Privileged

Defendants object to providing information "on the grounds that it would require the disclosure of information subject to that Wis. Stat. § 977.09." Suber Decl., **Ex. A**; Suber Decl., **Ex. B**, Defs.' Resp. to Pls.' ROG Nos. 1-2; Defs.' Resp. to Pls.' RFP Nos. 1-3, 6-13. This statute, however, simply provides that "[t]he files maintained by the office of the state public defender which relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, the board or the state public defender." Wis. Stat § 977.09. Discovery is authorized by law. And whether documents are confidential is a different question than whether those documents are privileged. The statute says *nothing* about conferring a privilege on these

documents. Defendants have not provided—and Plaintiffs have been unable to find—any authority holding that Wis. Stat § 977.09 confers a statutory privilege for the purposes of civil discovery. Also, Plaintiffs have communicated a willingness to enter a protective order to ensure that the confidentiality of certain information is maintained throughout this litigation, rendering this objection moot.

C. The Information is Not Publicly Available

Defendants argue that many of discovery requests seek information "available through public sources to which Plaintiffs have access and which they have already accessed." Suber Decl., **Ex. A**, Defs.' Resp. to ROG Nos. 1-2; Suber Decl., **Ex. B**, Defs.' Resp. to RFP Nos. 1-2. Defendants point to Exhibit A to the Amended Complaint as proof, but Exhibit A to the Complaint does not include the details requested in, for example, ROG Nos. 1 and 2. Further, Defendants argue that this information is confidential under Wis. Stat § 977.09, meaning it is not open to inspection by members of the public unless authorized by law. Indeed, Defendants objected extensively to the reliability of this data during the preliminary stages of this case, saying it was unreliable. *See e.g.,* Doc. 99 at 17-18. Given that Defendants are unwilling to stipulate that the CCAP data that Plaintiffs provide is authentic and reliable, Defendants must provide this information because it is only Defendants who have this data.

D. Defendants' Opinion on "Importance" is Irrelevant

Defendants object that certain requests seek information not "important to resolving the issues in the case[.]" Suber Decl., **Ex. A**, Defs.' Resp. to ROG Nos. 1-2; Suber Decl., **Ex. B**, Defs.' Resp. to RFP Nos. 1-2. Defendants' feeling of importantance is irrelevant. Plaintiffs are entitled to non-privileged, relevant documents to prove *Plaintiffs'* view of the case. The "importance" of information in the view of defense counsel has no bearing on whether certain information is discoverable.

CONCLUSION

Plaintiffs request that the Court compel Defendants to produce all documents responsive to Request for Production Nos. 1-3 and answer Interrogatory Nos. 1-2 within 30 days.

Dated: October 31, 2023

By: */s/ Sean H. Suber*

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Plaintiffs' Memorandum in Support of Motion to Compel 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: October 31, 2023

Electronically signed by:

/s/ Sean H. Suber
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