

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official capacity
as Secretary of the Wisconsin Department of
Health Services,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

**PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND
RE-SET TELEPHONE PRETRIAL CONFERENCE**

Plaintiffs Cody Flack and Sara Ann Makenzie (“Plaintiffs”) respectfully move this Court for leave to file an amended complaint no later than September 28, 2018 and to re-set the telephonic pretrial conference currently scheduled for September 7, 2018 to at least 45 days after the filing of Defendants’ answer to that amended complaint. In support of this motion, Plaintiffs state the following:

1. Plaintiffs filed their Complaint [Dkt. No. 1] on April 30, 2018. Defendants filed their Answer [Dkt. No. 34] on May 29, 2018.
2. On May 23, 2018, Plaintiffs filed a Motion for Preliminary Injunction [Dkt. No. 18]. The Court held a hearing on that motion on July 19, 2018 and issued a preliminary injunction, which applies only to Mr. Flack and Ms. Makenzie, on July 25, 2018. Op. & Order 39 [Dkt. No. 70]. In its decision, the Court ordered supplemental briefing on whether the preliminary injunction should be expanded to all Wisconsin Medicaid beneficiaries. *Id.*

3. As stated in Plaintiffs' Response to Defendants' Supplemental Brief [Dkt. No. 78], Plaintiffs wish to proceed with this case as a class action and to renew their motion for a broader preliminary injunction thereafter. Accordingly, Plaintiffs seek this Court's leave to file an amended complaint raising class action allegations and, if necessary, adding additional named plaintiffs, within 30 days of the date of this motion—*i.e.*, by September 28, 2018.

4. Under Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* "Accordingly, a plaintiff ought to be afforded the opportunity to test the merits of his or her claim, absent any apparent or declared reason, like undue delay, repeated failure to cure deficiencies, bad faith, or undue prejudice." *Sydow v. Weyerhaeuser Co.*, No. 14-CV-219-WMC, 2015 WL 6962698, at *2 (W.D. Wis. Nov. 10, 2015) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)); *see also Ind. Funeral Dirs. Ins. Trust v. Trustmark Ins. Corp.*, 347 F.3d 652, 655 (7th Cir. 2003); *Lopez v. City of Chicago*, No. 01 C 1823, 2002 WL 31415767, at *1, 4 (N.D. Ill. Oct. 25, 2002) (granting plaintiff's motion to amend complaint to add class action allegations).

5. Plaintiffs have not previously amended their complaint. Other than the limited discovery produced by Plaintiffs to Defendants prior to the Court's hearing on Plaintiffs' preliminary injunction motion, the parties have not yet commenced discovery in this case. Given the early stage of this litigation, Plaintiffs have not engaged in "undue delay, bad faith or dilatory motive" in seeking to amend their complaint to add class allegations. Defendants will not be prejudiced if the Court grants Plaintiffs leave to file an amended complaint.

6. By text order, dated May 30, 2018, the Court set the Telephone Pretrial Conference for June 20, 2018. At the request of the parties, who wished to postpone the pretrial

conference until after the Court's resolution of Plaintiffs' Motion for Preliminary Injunction, the Court continued the pretrial conference to July 24, 2018 [Dkt. No. 39] and then to September 7, 2018 [Dkt. No. 49].

7. If the Court grants Plaintiffs' motion for leave to file an amended complaint, Plaintiffs request that the Court cancel the Telephone Pretrial Conference currently scheduled for September 7, 2018 and re-set that conference after Defendants' answer to the amended complaint has been filed.

8. Plaintiffs have sought but not yet obtained Defendants' consent for the relief sought in this motion.

Based on the foregoing, Plaintiffs request that the Court (1) enter an order granting Plaintiffs leave to file an amended complaint no later than September 28, 2018; (2) cancel the Telephone Pretrial Conference set for September 7, 2018; and (3) re-set the Telephone Pretrial Conference to a date at least 45 days after Defendants have filed an answer to Plaintiffs' amended complaint.

Dated: August 29, 2018

Respectfully submitted,

/s/ Joseph J. Wardenski

Joseph J. Wardenski

Jennifer I. Klar

Orly T. May

RELMAN, DANE & COLFAX PLLC

1223 19th Street, NW, Suite 600

Washington, DC 20036

Telephone: (202) 728-1888

Facsimile: (202) 728-0848

jwardenski@relmanlaw.com

jklar@relmanlaw.com

omay@relmanlaw.com

Robert Theine Pledl
Mark A. Peterson
Daniel A. Peterson
MCNALLY PETERSON, S.C.
1233 North Mayfair Road, Suite 200
Milwaukee, WI 53226-3255
Telephone: (414) 257-3399
Facsimile: (414) 257-3223
rpled1@mcpetelaw.com
mpeterson@mcpetelaw.com
dpeterson@mcpetelaw.com

Abigail Coursolle
Catherine McKee
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
Telephone: (919) 968-6308
Facsimile: (919) 968-8855
coursolle@healthlaw.org
mckee@healthlaw.org

Attorneys for Plaintiffs