IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Montrell Carr, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 17-cv-7135
-vs-	)	
	)	
Sheriff of Cook County and Cook County, Illinois,	)	*(Judge Pacold)*
	)	
	)	*(Magistrate Judge Weisman)*
Defendants.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO ADD ADDITIONAL PLAINTIFFS

Following remand from the Seventh Circuit, plaintiff sought to add additional plaintiffs in response to a legal argument raised by defendants for the first time on appeal. Defendants ask the Court to deny the motion, arguing that plaintiff should have filed the motion before September 7, 2018, the deadline set in the original case management order to add additional plaintiffs. (ECF No. 31.) But defendants did not raise the new argument until 2023, when the case was on appeal. Plaintiff shows below that the Seventh Circuit rejected defendants' reasoning in *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 (7th Cir. 2011).

I. Plaintiff moved promptly to add additional plaintiffs

There is no merit in defendants' argument that plaintiff's request to add additional plaintiffs is untimely. (ECF No. 220 at 8-9.) Plaintiff has been diligent in presenting his motion to add additional plaintiffs, and diligence is

"the primary consideration for district court" in considering a request to change a scheduling order. *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cirt. 2011).

The timeliness of a motion to add plaintiffs to a putative class action is measured from the date "a substantial challenge to certification is made." *Randall v. Rolls-Royce Corp.*, 637 F.3d at 827. As the district court explained in *Lukis v. Whitepages Inc.*, 535 F. Supp. 3d 775 (N.D. Ill. 2021), *Randall* holds that "entry into the case of new putative class representatives is appropriate if it is 'sought as soon as a substantial challenge to certification is made' by the defendant to the original putative class representative's adequacy or typicality." *Id.* at 793, quoting *Randall*, 637 F.3d at 827.

In this case, defendants did not make any challenge to whether plaintiff Scott could be an adequate class representative until the case was on appeal.

First, in opposing class certification, defendants did not argue that plaintiff or his counsel would not adequately represent the class. Instead, defendants limited their Rule 23(a) arguments to commonality (ECF No. 137 at 15-17) and typicality. (ECF No. 137 at 18-19.)

Second, when defendants offered to resolve Scott's individual damage claim, they drafted the settlement agreement to preserve Scott's standing to appeal the denial of class certification. Defendants offered judgment to

allow plaintiff "to prosecute an appeal from the order denying class certification in accordance with the procedure approved by the Court of Appeals in *Pastor v. State Farm Mut. Auto Ins. Co.*, 487 F.3d 1042 (7th Cir. 2007) and *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012)." (ECF No. 179, ¶ 8). Defendants drafted the offer of judgment to preserve plaintiff's right "to appeal, on behalf of the proposed class, the district court's order denying the motion for class certification." (ECF No. 179, ¶ 2). And Defendants' offer confirmed that plaintiff "retain[ed] the right to seek an incentive award and reimbursement of the costs and fees he ha[d] incurred in the prosecution of this case as a class action." *Id.*

Defendants argued for the first time in their opening brief in the Seventh Circuit that plaintiff lacked standing to represent the putative class. The Court of Appeals rejected this argument, *Scott v. Dart*, 99 F.4th 1076 (7th Cir. 2024), and defendants are persisting in their Janus-like tactics by seeking certiorari.

Defendants' challenge to plaintiff's standing to prosecute the appeal is a strong harbinger of their intent to dispute plaintiff's ability to adequately represent the putative class in the district court. Plaintiff acted promptly to respond to this impending argument after the Court of Appeals issued its mandate.

Plaintiff expects that defendants will argue on remand that he cannot adequately represent the class because he settled his individual claim by accepting their offer of judgment. The Supreme Court declined to answer this question in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980). There, after holding that the named plaintiff whose claim had become moot had standing to challenge the adverse class ruling on appeal, the Court noted that "[t]he question of who is to represent the class is a separate issue." *Id.* at 407 (footnote omitted). The Court explained:

> We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class as yet has been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate. We decide only that Geraghty was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. Thus, it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification.

Id. This question need not be answered here either. As the Supreme Court noted, the two options for the district court on remand were "whether Geraghty may continue to press the class claims or whether another representative would be appropriate." *Id.* The pending motion to add additional plaintiffs avoids the need to answer this question by permitting Scott to press the class claims *and* by adding additional plaintiffs whose standing cannot be challenged.

Plaintiff did not have an opportunity to seek to add additional plaintiffs until August 1, 2024, when the mandate of the Seventh Circuit was entered on the civil docket. (ECF No. 196.) In the joint status report filed on August 14, 2024, plaintiff gave notice that he intended "to seek to add additional plaintiffs." (ECF No. 198, ¶ 3.) Plaintiff filed his motion to add additional plaintiffs on October 16, 2024 (ECF No. 202), before defendants formally challenged plaintiff's ability to represent the putative class.

Defendants are unable to argue that plaintiff failed to add additional plaintiffs "as soon as a substantial challenge to certification is made." *Randall*, 637 F.3d at 827. It is absurd to argue that plaintiff should have sought to add additional plaintiffs before defendants challenged his adequacy as a class representative—something which is now only anticipated. The Court should therefore deny defendants' timeliness argument.

II. Defendants raise three other meritless arguments

A. There is no cognizable prejudice

The Court of Appeals remanded this case for further consideration of plaintiff's motion for class certification. *Scott v. Dart*, 99 F.4th 1076, 1079 (7th Cir. 2024). The Seventh Circuit identified numerosity and adequacy of representation as two areas requiring further proceedings. *Id.*

Defendants argue that they would be prejudiced by further consideration of whether the case should proceed as a class action. (ECF No. 220 at 9-10.) Defendants should have made this argument to the Court of Appeals.

Accepting defendants' argument would be inconsistent with the mandate of the appellate court.

Defendants have known throughout the pendency of this case that they are facing a class action. Adding additional class representatives will cause defendants "no cognizable prejudice." *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 616 (7th Cir. 2020). The Court should reject this objection.

B. The "futility" argument is frivolous

There is no merit in defendants' argument that adding additional plaintiffs would be "futile." (ECF No. 220 at 10-11.) Defendants admit that this argument turns on a theoretical future ruling by the Supreme Court "that Scott lacked standing to appeal." (ECF No. 220 at 11.) It is a long road from a petition for writ of certiorari to a favorable decision on the merits. The Court should not make a ruling based on defendants' hope that the Supreme Court will grant certiorari and rule in their favor.

C. An amendment to a complaint is a well-established procedure to add parties to an existing complaint

Plaintiff included an "amendment to amended complaint" at pages 6-8 of his motion to add additional plaintiffs, ECF No. 202. An "amendment to complaint" is a long-standing procedure for adding claims and parties to an existing complaint. As the Indiana Supreme Court explained in *Eigenman v. Rockport Building & Loan Ass'n*, 79 Ind. 41, 1881 WL 7120 (1881):

> The amendment seems to have been made by writing it on a separate paper. The record shows that this paper was filed as an amendment to the complaint. This, we think, may be done, and then the two papers--the original complaint and the amendment--will constitute the amended complaint. Where the whole structure of the complaint is changed, it is generally re-written, but where the amendment, as in this case, consists of an additional averment merely, we can see no reason for re-writing the whole complaint. The original complaint and the amendment being in the record, they should be treated as the amended complaint.

1881 WL 7120 at *2.

An amendment to the complaint has been used in this district in more recent times. *See, e.g.*, *Longview Aluminum, LLC v. Alcoa, Inc.*, No. 03 C 709, 2003 WL 289241, at *1 (N.D. Ill. Feb. 7, 2003), where the district judge directed the plaintiff "to file an amendment to Complaint ¶ 1's first sentence (*not* a self-contained Amended Complaint, as some lawyers in other cases, exhibiting anticonservationist tendencies, have filed in the past."

Defendants assert that an "amendment to amended complaint" is impermissible under the Federal Rules of Civil Procedure. (ECF No. 220 at 12.) Defendants, however, are unable to identify any provision of the Federal Rules that prohibits an amendment to an amended complaint, rather than a self-contained amended complaint. *Cf. Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) ("[a]ny district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain ...' should stop and think: What rule of law requires a complaint to contain that

allegation?") And even if defendants could point to such a rule, the remedy would be to order the party to file a self-contained amended complaint.

Plaintiff will, of course, file a self-contained second amended complaint if the Court prefers a self-contained amended complaint. But the amendment to complaint that plaintiff drafted identifies the new allegations and provides ample notice of the new allegations. Defendants do not argue otherwise.

III. Conclusion

For the reasons above stated and those previously advanced, the Court should grant plaintiff's motion to add additional plaintiffs.

Respectfully submitted,

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