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

Theresa Kennedy,	)	
	)	
Plaintiffs,	)	
	)	No. 20-cv-1440
-vs-	)	
	)	
City of Chicago,	)	*(Judge Durkin)*
	)	
Defendant.	)	

REPLY IN SUPPORT OF MOTION FOR LEAVE TO ADD PLAINTIFFS AND TO FILE AMENDMENT TO AMENDED COMPLAINT

Defendant is mistaken in arguing (ECF No. 152 at 1) that Judge Feinerman ruled on the merits of plaintiff's motion to extend the time to add additional plaintiffs.

> Judge Feinerman denied this request without prejudice:
>
> I'll deny the request to extend the time to move to add new parties. That's without prejudice to plaintiff making another run at it at some future juncture. I'm not saying that it should be granted at that future juncture. It's just I don't know what's going to happen between now and then.
>
> And given that, if the plaintiff wants to ask again, the plaintiff can ask again; and then that decision will be made based on the circumstances prevailing at that juncture.

Tr., Dec. 14, 2022 at 9:8-15, filed as ECF No. 152-1.

The ruling "without prejudice to plaintiff making another run at it at some future juncture" is unambiguous and was not a decision on the merits.

The case reached the "future juncture" on February 10, 2023 when defendant announced its intention "to file a motion for summary judgment on Plaintiff's claims." (ECF No. 146 at 3.) Plaintiff is responding to this announcement by "making another run at it." The Court should reject defendant's request to treat a ruling made "without prejudice" as a determination of the merits of the present motion.

1. The substitution or addition of named plaintiffs is routine before a class has been certified

The Court should also reject defendant's contention that substitution or addition of unnamed class members as named plaintiffs is "routine" only at the early stages of a case or "after a class is certified." (ECF No. 152 at 12-13.) This argument cannot be squared with the decision of the Seventh Circuit in *In re Allstate Corp. Securities Litigation*, 966 F.3d 595 (7th Cir. 2020).

The district court in *In re Allstate Corp. Securities Litigation* allowed the addition of an additional class representative before ruling on class certification. 966 F.3d at 614. The Seventh Circuit rejected the defendant's challenge to this ruling, observing that "[t]he new representative may be able to help resolve or avoid problems with another class representative or may enable certification of a modified class or subclasses." *Id.* at 616. The Court of Appeals described adding an additional plaintiff as furthering the "goals of efficiency and economy," *id.* at 615 and analogized adding a new

representative party as "rearrang[ing] the seating chart within a single, ongoing action." *Id.* at 615.

District courts in this circuit have freely allowed the addition or substitution of named plaintiffs before class certification.

In *Lavender v. Driveline Retail Merchandising, Inc.*, 3:18-cv-2097, 2019 WL 4237848 (C.D. Ill. Sept. 6, 2019), the plaintiff sought to replace the named plaintiff while the motion for class certification was pending. *Id.* at *2. As in this case, the motion to amend was filed promptly after defendant gave notice of its intent to challenge the named plaintiff. *Id.* at *3. The district judge (Myerscough, J.) granted the motion to replace the named plaintiff. *Id.* at *4.

Similarly, in *In re Navistar MaxxForce Engines Mktg., Sales Practices, & Products Liab. Litig.*, 14-cv-10318, 2018 WL 316369 (N.D. Ill. Jan. 4, 2018), the district court (Gottschall, J.) allowed the plaintiff to add a new class representative to the case while the class motion was pending. *Id.* at *2.

In *Beringer v. Standard Parking Corp.*, 07-cv-5027, 2008 WL 4390626 (N.D. Ill. Sept. 24, 2008), the district court (Pallmeyer, J.), while considering a motion for class certification, concluded that the named plaintiff was not a member of the class, and invited plaintiff's counsel to substitute a new class

representative. *Id.* at *1. This case would be in the same posture as *Beringer* if defendant prevails on its motion for summary judgment on plaintiff's individual claim. As in *Allstate Corp. Securities Litigation*, *supra*, the "goals of efficiency and economy," 966 F.3d at 615, support granting the motion to add additional named plaintiffs now.

The Court should therefore reject defendant's argument that the addition of unnamed class members as named plaintiffs is "routine" only in the early stages of a case or "after a class is certified." (ECF No. 152 at 12-13.) The same is true for defendant's "good cause" argument.

2. The Seventh Circuit has not ruled on whether "good cause" is required to add or replace named plaintiffs in a putative class action

Plaintiff discusses in part 3 below the district court cases that apply the "good cause" standard of Rule 16(b)(4) to motions to add or replace named plaintiffs in a putative class. The Seventh Circuit, however, has not ruled on whether Rule 16 applies to this type of motion.

In *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, 11-cv-775, 2014 WL 2219143 (N.D. Ill. May 29, 2014), a case where this Court denied a motion to add or substitute named plaintiffs, the Court described the motion as one "to intervene," stating "counsel has had more than three months to find a new named plaintiff to intervene." *Id.* at *3. This approach is consistent with the various ways in which the Seventh Circuit has referred to

the proper procedure to replace a named plaintiff in a putative or certified class action.

In *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 (7th Cir. 2011), the Seventh Circuit referred to "permissive intervention by an unnamed plaintiff, who if intervention is allowed becomes the named plaintiff and thus the class representative." *Id.* at 826–27. Thereafter, the Court referred to replacement of the named plaintiff as "an ordinary pleading amendment." *In re Allstate Corp. Securities Litig.*, 966 F.3d 595, 616 (7th Cir. 2020). More recently, in *Mullen v. GLV, Inc.*, 37 F.4th 1326 (7th Cir. 2022), the Seventh Circuit, used a different formulation, referring to the procedure as one "to substitute a new class representative" *Id.* at 1328. These differing formulations are consistent with *Chapman v. Wagener Equities, Inc.*, 09-cv-07299, 2012 WL 6214597 (N.D. Ill. Dec. 13, 2012), where the district judge (Tharp, J.) granted a pre-certification motion to add a named plaintiff and class representative without adverting to the "good cause" standard of Rule 16.

One way to explain the district court's power to entertain motions to "intervene by new named plaintiffs," *Giannopoulos, supra,* 2014 WL 219143 at *2, in the "jurisdictional void that is created when the named plaintiffs' claims are dismissed," *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006), is to view the unnamed members of the putative class as akin to

parties who are already in the case and may therefore be added or substituted as a named plaintiff without regard to the time limits of a Rule 16 scheduling order. This is consistent with *In re Allstate Corp. Securities Litig.*, 966 F.3d 595 (7th Cir. 2020), where the court referred to a motion to substitute a named plaintiff as seeking "only to rearrange the seating chart within a single, ongoing action." *Id.* at 616. The *Allstate* court, however, also referred to substituting a new named plaintiff as "an ordinary pleading amendment governed by Federal Rule of Civil Procedure 15," *id.*, which would make the amendment subject to the "good cause" standard of Rule 16.

Rule 15 is not a good fit for substituting or replacing named plaintiffs in a putative class action. In this case, the Rule 16 scheduling order required that any motion to amend or to add new parties be filed by April 26, 2021. (ECF No. 50.) But the claim of proposed additional plaintiff Santiago Bravo did not accrue until November 20, 2022, when the challenged municipal policy prevented Bravo from posting bail on a warrant. (ECF No. 148 at 5, Proposed Second Amended Complaint, ¶ 87-88.) Similarly, the claim of proposed additional plaintiff Plummer did not accrue until June 19, 2022. (ECF No. 148 at 6, Proposed Second Amended Complaint, ¶ 92-93.)

Bravo and Plummer are both members of the putative class but, in defendant's view, neither can serve as a class representative because their claims accrued after the April 26, 2021 deadline. (ECF No. 152 at 9.) The Court should reject this illogical argument and decline to apply the "good cause" standard to plaintiff's motion to add Bravo and Plummer as additional named plaintiffs. Plaintiff shows below, in the alternative, that there is "good cause" to grant the motion.

3. There is "good cause" to join additional plaintiffs as class representatives when, as here, plaintiff moved promptly after learning of a challenge to the standing of the original named plaintiff

Defendant announced on February 10, 2023 in the joint status report that, "based on Plaintiff's testimony during her February 3, 2023 deposition, the City intends to file a motion for summary judgment on Plaintiff's claims, and will do so as expeditiously as is practicable." (ECF No. 146 at 3.) On February 28, 2023, less than three weeks after defendant made this announcement, plaintiff filed her motion to add additional plaintiffs.[1] (ECF No. 149.)

[1] Plaintiff's promptness in this case is quite different than the plaintiff in *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, 11-cv-775, 2014 WL 2219143, at *3 (N.D. Ill. May 29, 2014), where the court stated: "counsel has had more than three months to find a new named plaintiff to intervene." *Id.*at *3.

Defendant argues that there cannot be "good cause" to grant the motion, relying on the statements of the predecessor judge that plaintiff Kennedy's "adequacy and typicality should have been apparent to everybody." (ECF No. 152 at 7.) While Judge Feinerman went on to observe that a challenge to plaintiff Kennedy's suitability as a class representative "was something that perhaps could have been anticipated" (Tr., Dec. 14, 2022, 9:5-6, ECF No. 152-1 at 9), focusing on the elements of Rule 23 misses the point of defendant's impending "motion for summary judgment on plaintiff's claims."

Defendant's impending motion for summary judgment will focus on plaintiff Kennedy's individual claim: Whether plaintiff is an adequate class representative is not a ground for summary judgment on her individual claim.

Plaintiff expects defendant to seek summary judgment by arguing that plaintiff was not injured by defendant's policy and therefore lacks standing to sue.[2] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). Defendant admits that it learned the factual basis for its impending motion for summary judgment at plaintiff's deposition, stating in the Joint Status Report filed on February 10, 2023 that the impending motion is "based on Plaintiff's testimony during her February 3, 2023 deposition." (ECF No. 146 at 3.)

[2] Plaintiff will oppose this argument, but recognizes the uncertainty of contested litigation.

The "'good cause' standard primarily considers the diligence of the party seeking amendment." *Trustmark Ins. Co. v. Gen & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005), quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992). The district court applied this standard in *Fair Hous. Ctr. of C. Indiana, Inc. v. Rainbow Realty Group, Inc.*, 1:17-cv-01782RLMTAB, 2019 WL 13083142 (S.D. Ind. Mar. 8, 2019), to allow the joinder of additional defendants when the plaintiff learned about their involvement ten months after the deadline set in the scheduling order, i*d.* at *1, and then filed the motion to join parties 60 days thereafter.[3] Here, plaintiff learned about defendant's impending challenge to her claim on February 10, 2023 and filed her motion to add additional plaintiffs on February 28, 2023. This prompt action shows diligence.

The district court in *Boyd v. Meriter Health Services Employee Ret. Plan*, 10-cv-426-WMC, 2012 WL 12995302, at *2 (W.D. Wis. Feb. 17, 2012) found good cause to add additional named plaintiffs when the motion was filed the same day as the motion for class certification. *Id.* at *2. The defendant did not challenge this ruling on appeal, where the Seventh Circuit

[3] The docket in *Fair Housing Center* shows that the motion to add named plaintiffs was filed on December 17, 2018. (ECF No. 87, No. 1:17-cv-01782RLMTAB, S.D. Ind.) The deposition was taken on October 19, 2018. 2019 WL 13083142 at *1.

affirmed the grant of class certification. *Johnson v. Meriter Health Services Employee Ret. Plan*, 702 F.3d 364 (7th Cir. 2012).

District courts in other circuits routinely find "good cause" to substitute for a named plaintiff in a putative class action when, as in this case, the plaintiff moves promptly.

In *Bates v. Leprino Foods Co.*, 2:20-cv-00700AWIBAM, 2022 WL 3371584 (E.D. Cal. Aug. 16, 2022), the district court found "that good cause exists under Rule 16 for Plaintiff to amend the operative complaint because Plaintiff was diligent in bringing his motion to substitute." *Id.* at *3 (footnote omitted). There, the plaintiff had accepted employment that precluded serving as the class representative and "filed his motion to substitute only several weeks after it became apparent [that he could not continue to serve as a class representative]." *Id.* In this case, as in *Bates*, the named plaintiff moved to add additional plaintiffs less than three weeks after defendants announced that they would seek summary judgment on plaintiff's individual claim, as discussed above at 7.

In *Vision Constr. Ent Inc v. Argos Ready Mix LLC*, 3:15-cv-534-MCR-HTC, 2020 WL 6749040, at *3 (N.D. Fla. May 20, 2020), the district court found good cause because the plaintiff "could not in the exercise of due diligence have moved to amend to substitute another class representative

before the [deadline to amend] expired." *Id.* at *3. There, it had not been "obvious" that the district would find that the plaintiff was not an adequate class representation. *Id.* The plaintiff moved to substitute plaintiffs "promptly after the ruling." The same is true here: Defendant filed its answer to the original complaint on August 7, 2020 (ECF No. 27) and its answer to the amended complaint on June 3, 2021. (ECF No. 63.) Defendant then waited until July 19, 2022 before filing its motion for judgment on the pleadings.[4] (ECF No. 115). Defendant prevailed on the motion by arguing that its policy was compelled by a General Administrative Order of the Circuit Court of Cook County that been issued in 2015. (ECF No. 136 at 5-8.) Defendant is unable to explain its delay in filing the motion for judgment on the pleadings and should therefore not be heard to complain that plaintiff is responsible for any delay in seeking to add additional named plaintiffs.

In *Doe v. City of Memphis*, 2:13-cv-03002JTFCGC, 2014 WL 12978864 (W.D. Tenn. Sept. 24, 2014), the plaintiff sought to add a "substitute class representative" after the deadline set in the scheduling order. *Id.* at *1. The court described the order as "not seeking to add additional parties, but merely to substitute class representatives for the next step: class

[4] Rule 12(c) of the Federal Rules of Civil Procedure allows a motion for judgment on the pleading to be filed at any time "after the pleadings are closed—but early enough not to delay trial."

certification." *Id.* The district court rejected the defense argument that the motion should be denied for "lack of good cause" under Rule 16, because "Plaintiff has been diligent in their investigation into the possible deficiencies and in their determination that substitute class representatives be added for protection … [and] Defendant has not advanced any argument that they will be prejudiced." *Id.* at *2.

In re Motor Fuel Temperature Sales Practices Litig., 07-MD-1840-KHV, 2009 WL 3122501 (D. Kan. Sept. 24, 2009) is another case where the district court found "good cause" for substituting a class representative. There, plaintiff's counsel learned in December of 2008 that the named plaintiff was going to be a criminal defendant and "made the decision that new plaintiffs should be substituted to represent the interests of the class." *Id.* at *1. Although July 30, 2008 was the deadline set in the scheduling order to add new parties, the district court found that the plaintiff had established "good cause" to substitute because "plaintiff had no reason to seek substitution prior to the deadline." *Id.* at *2.

Defendant asks the Court to depart from these cases by comparing this case to one where, after the defendant filed for summary judgment, the plaintiff sought "to add a large number of new specific claims." *Johnson v. Methodist Med. Ctr. of Illinois*, 10 F.3d 1300, 1304 (7th Cir. 1993) (ECF

No. 152 at 9.) The Court should reject this proposed comparison. As explained above, plaintiff seeks "only to rearrange the seating chart within a single, ongoing action." *In re Allstate Corp. Securities Litig.*, 966 F.3d 595, 616 (7th Cir. 2020).

4. Conclusion

The Court should therefore grant the motion to add Bravo and Plummer as additional plaintiffs and allow plaintiffs to file the amendment to the amended complaint.

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