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

MICHAEL L. SHAKMAN and PAUL M. LURIE, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 69 C 2145
THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, et al.,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO GOVERNOR QUINN'S RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR ENTRY OF SUPPLEMENTAL RELIEF

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Introduction

Governor Quinn's Response ("**Response**") does not dispute that his administration engaged in conduct that violated the 1972 Decree ("**Decree**"). The Better Government Association ("**BGA**") report that led to the Plaintiffs' Amended Motion ("**Motion**") included these allegations, none of which the Response contests:

> Since 2003 and continuing through at least 2012, IDOT officials routinely manipulated job descriptions as a means to get around court-ordered hiring rules.
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> In many cases, once political hires were made they did not fulfill the responsibilities in their job descriptions.
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> The number of political hires at IDOT jumped by 63 percent in the last decade, while the number of highway road maintainers plummeted by nearly 800 posts.
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> Those who landed on the state payroll through the questionable hiring process include the daughter of a retired Chicago alderman, and a son of a politically connected businessman who once sat on the Illinois State Toll Highway Authority board. [Exhibit G to Motion at 1-2.]

After we filed the Motion, IDOT's then-Secretary, Ann Schneider, gave a remarkably frank interview in which she admitted that IDOT hired people on an exempt basis into positions that should not have been exempt.[1] (On July 1 the Chicago *Tribune* reported that she had resigned.[2]) She admitted that IDOT later transferred them to non-exempt positions without allowing others to compete for the jobs. She also said that IDOT intends to leave the illegally-transferred employees in their present positions. While the initial hiring into *faux*-exempt positions was outside the scope of the Decree, IDOT's other actions would clearly violate the Decree if any of the original hiring was political and the ensuing non-competitive transfers were

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[1] Patrick McCraney, *IDOT Secretary Talks About BGA's Clout Hiring Investigation*, Better Government Association, April 29, 2014, www.bettergov.org/blogs/investigators_notebook/idot_secretary_talks_about_bgas_clout_hiring_investigation/.

[2] Monique Garcia and Ray Long, *Quinn's IDOT chief resigns amid patronage questions*, Chicago *Tribune*, July 1, 2014, www.chicagotribune.com/news/politics/clout/chi-quinns-idot-chief-resigns-amid-patronage-questions-20140630,0,499249.story.

based on the politically-favored status of the employees. *See* "**Schneider Interview**," attached hereto as Exhibit 1.[3] The Governor's recent imposition of a moratorium on political hiring at IDOT and engagement of an outside auditor confirm the existence of a systemic problem.[4] (If despite the Governor's failure to deny that politics motivated the employment actions, he wants to contest that issue, then the discovery Plaintiffs seek is all the more needed.)

Secretary Schneider's Interview also moots the Governor's statute of limitations argument. As shown below, the 180-day time period, upon which the Governor erroneously relies, does not apply here. It applies only to enforcement actions brought by individual class members, not to actions by the Plaintiffs to enforce the Decree against systemic violations. But even if a 180-day period did apply, the Secretary admitted in her April interview both to on-going, systemic violation of the Decree and to a new decision not to remedy the illegal transfers. *See* Schneider Interview, Ex. 1 at 4 (". . . removing the people from these [non-exempt] jobs would end up costing the state and the taxpayers a lot of money, . . . at this point I think that we, so to speak, cut our losses and move forward, and make sure that this does not happen again.")[5]

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[3] With regard to the transfers from *faux*-exempt positions, the Secretary also admitted:

> Those [allegedly exempt job] descriptions were sent to CMS [Central Management Services] for re-classification, and *we have just gotten back, really, just a couple days ago*, and we were going through what we got back from CMS, *but it appears based on what they sent back to us, that, it appears right now that 48 of the 60 positions, they're performing Rutan-covered duties, so those are Rutan-covered [non-exempt]* positions, and 12 of those positions that were sent over came back as retaining their Rutan-exempt status. Ex. 1 at 3 [Italics added.]

In other words, 80% of these exempt positions were never exempt. Plaintiffs did not learn that IDOT does not intend to remedy the illegal transfers until we read the Secretary's interview.

[4] AP, *Quinn Halts Political Hiring*, July 4, 2014, http://wuis.org/post/ap-quinn-halts-political-hiring.

[5] The contention that individuals placed into *faux*-exempt positions on the basis of unlawful political considerations cannot be removed is wrong as a matter of law. On November 9, 2010 this Court entered an Agreed Order addressing individuals hired into *faux*-exempt positions by Cook

Thus, the question presented by the Motion is not whether the Plaintiffs have standing to seek hiring reforms or whether the 180-day statute of limitations bars the claim. The real questions are: (1) what procedures make sense to remedy the current, continuing and admitted conduct with regard to people who are already State employees, which is within the scope of the Decree, and (2) whether (and what) discovery is warranted. Plaintiffs' position is as follows:

(1) *Remedies for admitted current violations*: We ask that the Court appoint a monitor with the initially limited assignment of working with IDOT and the Governor's Office, as monitors have worked in this lawsuit with the City of Chicago ("City"), the County of Cook ("County"), the Cook County Sheriff ("Sheriff"), the Forest Preserve District of Cook County ("Forest Preserve"), the Cook County Assessor ("Assessor"), and the Cook County Recorder of Deeds ("Recorder"), to determine why the admitted conduct occurred, whether it would be too costly (as Secretary Schneider claimed) to open the positions to others, and what needs to be done systemically to prevent future violations. Contrary to the straw man erected by the Response, Plaintiffs do not propose that the monitor take over or control IDOT's employment system or restrict the ability of the Governor to operate lawfully. None of the other monitors appointed by the Court has taken over any employment system. The role of the monitor is not to dictate, but to investigate, observe and report on whether government used improper political considerations in employment decisions. Whether additional actions are warranted should be decided later, after discovery by the Plaintiffs and an initial report from the monitor.

(2) *Discovery*: Even if the Governor wishes to and is permitted to contest that politics motivated the original hires and the transfers, the admitted facts with respect to IDOT,

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County. (Dkt. 1938, attached hereto as Exhibit 2.) The Court ruled that individuals hired as the result of unlawful political discrimination could be terminated on the basis of political considerations because these individuals were hired with the expectation that they could be terminated for political reasons. *Id.* at ¶ 9(C). The Governor's apparent decision to continue to protect clouted individuals provides additional support for this Court's intervention.

coupled with the history of wide-spread, uncontested political employment decisions stretching back into the Blagojevich administration, establish serious continuing patronage problems in State employment that need to be corrected. The facts presently known warrant discovery to determine where else violations of the Decree have recently occurred, or are occurring, and whether the actions proposed by the Governor, the substance of which has yet to be disclosed, are adequate to address the recurring problems. Plaintiffs have served written discovery requests and a Rule 30(b)(6) deposition notice, copies of which are attached as Exhibits 3 and 4. Once that discovery is completed, if Plaintiffs believe additional discovery is warranted we will confer with the Governor's counsel and attempt to resolve discovery matters directly. If we reach an impasse, we will ask the Court to resolve it. The result of that discovery will inform the nature and the scope of the remedy to the extent needed beyond the known IDOT violations.

Contrary to the Response, the Motion is not aimed at hiring violations, as to which the Governor raises standing objections. It is focused on post-hiring practices regarding transfers, assignments, classifications and promotions clearly within the scope of the Decree, as to which there is no standing issue. Use of exempt positions to affect existing employees is within the scope of the Decree. Transfers to help employees who were hired politically are also. Part of the relief Plaintiffs seek is the creation of a *bona fide* exempt list. It is enough for standing and enforcement purposes that a corrected list will apply to post-hiring employment practices that fall within the ambit of the Decree; such relief may produce a collateral benefit regarding hiring, since the exemptions will presumably apply both to hiring and post-hiring decisions.

Argument

I. THE AMENDED MOTION IS TIMELY.

A. *Laches,* Not *Smith,* Is the Only Timeliness Defense Available.

The Governor mistakenly relies on the six-month limitations period borrowed from Title

VII in *Smith v. City of Chicago*, 769 F.2d 408 (7th Cir. 1985). *Smith* created a narrow exception to the normal rule that *laches* applies to proceedings to enforce consent decree violations. It does not apply here. *Smith* was an individual enforcement action by a City employee seeking individual relief based on an alleged violation of the Shakman decree solely as to that employee. The Seventh Circuit held that a fixed limitations period, rather than the more flexible doctrine of *laches*, should apply to such individual enforcement actions against the City in this lawsuit, and borrowed Title VII's 180-day period. *Id*. at 413. It did so, the Court said, to avoid the time-consuming process of many different district judges evaluating whether the *laches* defense should apply to individual complaints under the *Shakman* decree that applied to the City. *Id.* at 410-12.[6] *Smith* recognized that *laches* would continue to apply to requests for equitable relief in this (or any other) Section 1983 lawsuit, rather than a 180-day rule, when the named plaintiffs and class counsel sought to remedy systematic and ongoing decree violations (*id.* at 411-12):

> . . . this case, *unlike the original Shakman suit*, is not based on Sec. 1983. It is an action for contempt of the consent decree. The decree defines and shapes the rights in question. Many of the issues that make Sec. 1983 litigation difficult are not present here. *The decree defines jobs for which political considerations are appropriate and those for which they are not. Cf. Grossart v. Dinas*, 758 F.2d 1221 (7th Cir. 1985). The district court, sitting without a jury, hears *Shakman* cases expeditiously. The simplification of the litigation suggests the use of a shorter period of limitations. *Cases under Shakman are all of a kind*. They are complaints about a particular kind of discrimination in the course of employment. [Italics added.]

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[6] In *Smith*, the Court of Appeals cited the need to establish uniform rules for individual-employee enforcement claims: "[i]n 1984 alone the district court published at least four decision adjudicating claims of laches in cases under Shakman, and there must have been many more unpublished orders, such as the one we review here." *Id.* at 411.

Smith grew out of the unusual scope of the decrees in this case, which went beyond the typical situation where class counsel or the occasional individual may bring an enforcement proceeding (subject to *laches*) and instead gave enforcement rights to "any registered voter." Motion, Ex. A, Decree at 4 ¶ H(2). *Smith's* 180-day period was based on the need to provide clear rules for individual employees so that each could decide what to do in the individual employment circumstances presented. *See* 769 F.2d at 411.

In contrast, this Motion is not "all of a kind" with individual employee enforcement actions. It is part of "the original *Shakman* suit" and seeks to implement equitable relief to which the Governor and other defendants agreed in the Decree. Note the relief Plaintiffs seek:

Creation of Genuine Exempt Lists. The Motion addresses the State's failure to adopt and properly apply exempt lists. *Smith* expressly relied upon the existence of *bona fide* exempt lists for run-of-the-mill individual enforcement cases against the City. But such lists don't exist for IDOT. Secretary Schneider admitted so when she said that in April of this year she had just received word from CMS that the exempt list IDOT had used categorized positions as exempt when they were not. *See* n. 3, *supra*. She admitted that IDOT hired people on an exempt basis for jobs that should not have been exempt, and then transferred them wholesale to non-exempt jobs on a non-competitive basis. The effect was to transfer existing employees to non-exempt positions based on the prior clout that got them hired in *faux*-exempt positions. That is a systemic violation of the Decree that requires a remedy.

Plaintiffs seek equitable relief in the form of a procedure to create *bona fide* exempt lists and to monitor their use. Creating an exempt list was an expressly retained part of this Court's jurisdiction under the Decree. One would have hoped that the State would have created proper exempt lists pursuant to its obligations under *Rutan*. Clearly, at least for IDOT, it did not. In addition to Secretary Schneider's admissions, IDOT's failure is reflected in its claim to have 516 exempt positions as of September 2013.[7] That is a grossly unreasonable number if the proper standards for defining exemptions under *Branti v. Finkel*, 445 U.S. 507 (1980), were applied.[8]

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[7] *See* Motion at ¶ 18. According to a FOIA response, IDOT claimed to have 516 exempt positions as of September 30, 2013, 374 of which were filled.

[8] " . . . the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party

Relief for Improper Transfers. Plaintiffs also seek relief for wholesale transfers of employees within IDOT from *faux*-exempt position to positions that should have been filled on a non-political basis, but were not. In light of Secretary Schneider's categorical assertion that opening those non-exempt positions to permit non-political hiring is off the table, we seek the appointment of a monitor to investigate and recommend methods to correct that violation of the Decree. In view of the history of serious violations of the Decree under the Blagojevich and Quinn administrations it is not reasonable to rely on IDOT to police its own employment activities, especially when its Secretary announces that IDOT will not even consider a remedy with regard to 48 individuals who she admits were improperly transferred to non-exempt jobs outside of the normal competitive process. Designing relief for this situation could not be more different from the *ad hoc* single-employee enforcement actions for which *Smith* created the 180-day limitation period in lieu of the normal *laches* rule.

History confirms that *Smith* does not apply to equitable enforcement proceedings brought by the original plaintiffs. Neither this Court nor the Seventh Circuit has applied *Smith*, in the 29 years since it was decided, to any enforcement proceeding brought by class counsel for the named plaintiffs, including the post-Sorich proceedings against the City and other agencies that concerned conduct dating back, in some cases, many years. That is hardly surprising, since *Smith* acknowledges, and later Seventh Circuit opinions reaffirm, that enforcement of a consent decree is an equitable remedy and *laches* is normally the only basis to object to the timeliness of the request for relief. *See Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999) (district court properly applied *laches* to claim by city employee regarding violation of consent decree concerning rehiring of discharged employees).

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affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

The narrow reach of *Smith* is also confirmed by *Cook's* refusal to apply *Smith* to individual enforcement claims by non-parties outside of this case, and by (i) other Seventh Circuit opinions holding that other employment-related claims under 42 U.S.C. § 1983 are subject to the ordinary two-year limitations period, *see Herman v. City of Chicago*, 870 F.2d 400, 402-03 (7th Cir. 1989), and (ii) opinions following *Cook* and applying *laches* to proceedings to enforce consent decrees, *see Brennan v. Nassau Cnty*., 352 F.3d 60, 63 (2d Cir. 2003) (applying *laches* rather than limitations to a claim by named plaintiff of violation of a decree regarding police employment); *Bergmann v. Michigan State Transp. Com'n*, 665 F.3d 681, 683-84 (6th Cir. 2011) (applying *laches* to a claim by property owner regarding violation of consent decree); *cf. Florida Ass'n for Retarded Citizens, Inc. v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001) (permitting plaintiffs to bring motion to enforce 17-year-old consent decree because "a district court should enforce an injunction until either the injunction expires by its terms or the court determines that the injunction should be modified or dissolved.").

B. *Laches* Does Not Apply Here.

Having not raised a *laches* defense, the Governor has waived it. But the defense would have been untenable in any event. *Laches* requires both unreasonable delay and resulting material prejudice to the other party. *Zelazny v. Lyng*, 853 F.2d 540, 541 (7th Cir. 1988). Both are absent here. The Governor does not claim otherwise. He does not dispute that Plaintiffs did not discover the IDOT manipulations until the August 2013 BGA report. Plaintiffs followed up with a FOIA request on September 27, 2013, to which the Governor responded on October 21, 2013 by withholding 47 documents until after the Plaintiffs filed the Motion. Motion, ¶¶ 21-22. After review and further investigation, and in compliance with this Court's standing order, Plaintiffs sent Governor's counsel a draft of the Motion on March 13, 2014. His lawyers requested several weeks' delay before meeting, and a meeting was held on April 21, 2014.

Plaintiffs filed the Motion the next day. Not only is this timeline not unreasonable, the Governor does allege any resulting prejudice, which must be "substantial" for the defense to have credibility. *Coilcraft, Inc. v. Inductor Warehouse, Inc.*, No. 98 C 0140, 2007 WL 2071991, at *10 (N.D. Ill. July 18, 2007) (Cole, Mag. J.) (*laches* defense rejected regarding plaintiff's motion to enforce consent decree), *adopted by Coilcraft, Inc. v. Inductors, Inc.*, No. 98 C 140, 2007 WL 2728754 (N.D. Ill Sept. 13, 2007). In any event, even if there were a colorable *laches* defense, it ordinarily should not be decided on the pleadings, but rather is an affirmative defense that should be raised via an answer and resolved following discovery. *See Chicago Police Sergeants Ass'n v. City of Chicago*, No. 08-cv-4214, 2011 WL 2637203, at *3 (N.D. Ill. July 6, 2011); *Flentye v. Kathrein*, 485 F. Supp. 2d 903, 916-17 (N.D. Ill. 2007).

In short, neither the six-month limitations period of *Smith* nor the doctrine of *laches* bars Plaintiffs from seeking relief for the Governor's violations of the Decree.

C. The Motion Would Be Timely Even if *Smith* Were Applicable.

Even if the *Smith* period applied to equitable enforcement proceedings brought by Plaintiffs, the Amended Motion would be timely.

First, the Motion would relate back to the original motion filed in 2009 (Dkt. 1460.) An amendment to a pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The claim here arises out of a continuing practice of patronage set out in the 2009 filing. The Quinn administration continued to violate the Decree in 2010, 2011 and 2012 according to the BGA. The April 2014 amended Motion describes this last round of violations as additional evidence of continuing patronage practices that justify the entry of prospective injunctive relief.

Relation back is appropriate. Otherwise, Plaintiffs would be required to file a new action for each separate violation while our 2009 motion to enforce was pending.

Thus, even assuming the 180-day period applies, application of relation-back principles would only preclude relief that would undo improper transfers that occurred prior to June 22, 2009 (180 days before we filed the original motion). It would not apply to transfers after June 22, 2009, appointment of a monitor or prospective injunctive relief including the creation of proper exempt lists.

Second, Secretary Schneider's interview in April 2014 revealed to Plaintiffs a new, and continuing, violation of the Decree. She declared that IDOT did not intend to remedy the unlawful transfers of employees into non-exempt positions, and instead intended to ratify and freeze in place prior violations that she claimed not to have been aware of before the BGA report. This decision constituted a new violation and generated the concomitant rights of enforcement that the Motion seeks. As the U.S. Supreme Court held in a Title VII case, *Lewis v. City of Chicago,* 560 U.S. 205, 130 S. Ct. 2191 (2010), each new discriminatory application by government of a prior, unconstitutional policy gives rise to a new 180-day limitations period. Judge Dow applied *Lewis* in a *Shakman* case, finding each new implementation of an older violative policy started a new 300-day limitation period.[9] *See Chicago Police Sergeants Ass'n,* 2011 WL 2637203, at *4 (italics in original):

[9] It is interesting that Judge Dow applied the 300-day period applicable to Title VII claims in Illinois under § 2000e-5(e)(1) because it is a "referral" state, rather than the 180-day period. One could argue that to be consistent with the limitations period applicable to Title VII claims in Chicago, *Smith* should have applied the 300-day period rather than the 180-day period. But it clearly held that the 180-day period should apply, and that holding is binding on this Court. Plaintiff reserves the right to ask the Seventh Circuit to change the law regarding this issue, should it ever be considered by that Court. If the 300-day period were to apply, the April 2014 filing, based on facts discovered by Plaintiffs in August 2013, would be timely. Judge Dow's application of a 300-day period does not undermine the soundness of his analysis.

> . . . the Supreme Court [in *Lewis*] construed the timing rules under Title VII claims to hold that a plaintiff who did not file a timely charge challenging the initial adoption of a particular discriminatory practice may still bring a claim under Title VII based on the later *implementation* of that previously-adopted practice. . . . [T]he Court clarified that each time that the City implemented its earlier decision and excluded the applicants with lower scores on the exam, a "new violation occurred." *Id.* (citing 42 U.S.C. § 2000e-2(k)). *Lewis*, therefore, stands for the proposition that later implementation of a discriminatory policy can qualify as a new, actionable "employment practice." *See Id.* at 2198-99.

Under *Lewis* and *Chicago Police Sergeants*, the Secretary's ratification of a prior violation constitutes a new violation that is timely, if *Smith* were held to apply. This result is also consistent with the general principle of equity jurisdiction under which later efforts to nullify an outstanding court order may be enjoined. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 567-69 (1974) (supplemental injunctive relief warranted for City's violation of 11-year-old public park desegregation order after City made new agreement for use of parks by segregated private schools). Under either *Lewis* or *Gilmore* the Plaintiffs' Motion is timely.

II. THE COURT HAS AUTHORITY TO APPOINT A MONITOR.

This Court has no less authority to appoint a monitor than it did when appointing monitors with respect to the City, the County, the Sheriff, the Forest Preserve District, the Assessor or the Recorder. The Governor cites no cases questioning its authority to do the same here. With good reason: the authority is clear. "The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established." *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982) *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982). Thus, an injunction "may be attended by the appointment of a monitor with authority to observe defendants' conduct and thereby permit the federal court to oversee compliance with its continuing order." *Kendrick v. Bland*, 740 F.2d 432, 438 (6th Cir. 1984) (collecting cases). Indeed, when the district court in the Apple E-books antitrust litigation recently appointed a monitor, Apple conceded its authority to do so. *United States v. Apple Inc.*, 87 Fed. R. Serv. 3d

1163, at *16 (S.D.N.Y. 2014). The cases cited by the Governor (Response at 14-16) contain general statements about federalism, none of which would be violated by the appointment of a monitor with authority to investigate and report on compliance with the Court's remedy. The real issue should be the initial scope of the monitor's assignment (*i.e.*, whether initially limited to IDOT or not), not the need or authority for the appointment.

Extensive experience in similar circumstances in this case shows that a monitor is essential if the Court is to obtain accurate information on employment practices and to develop remedies that have a reasonable chance of being effective. As the Court knows, appointment of monitors has been critical to progress in rooting out patronage practices.

After further discovery by Plaintiffs and a report from the monitor concerning IDOT's admitted conduct, the Court may decide to expand the monitor's role. That need not be decided now. The Court has the power to appoint a monitor with an initially limited focus on admitted misconduct. Governor Quinn's response to our 2009 motion said that his administration should be given a chance to show that it could root out Governor Blagojevich's practices.[10] He has had that chance. The undisputed circumstances warrant a monitor now.

The Governor's remaining arguments against appointment of a monitor are unavailing.

First, the Governor argues that we have not shown that "any remaining issues between the parties . . . cannot be effectively addressed by a judge of this court." Response at 15. Not so. The Court is entitled to take into account what it knows from dealing with other defendants in this case who operate in Illinois' culture of patronage employment: Until a monitor is appointed

[10] The Governor's response to our 2009 motion stated: "Wresting responsibility from an elected official—before he has had a chance to remedy his predecessor's past alleged abuses—by appointing a costly special master would be an unwarranted intrusion into a State executive's core authority." Dkt. 1551 at 19.

with the ability to determine by first-hand investigation what is really happening in government employment, there is no way reliably to evaluate compliance with existing Court orders.

In opposing Plaintiffs' 2009 motion, Governor Quinn argued that "charges of ongoing patronage practices are purely speculative" and that he was entitled to time to "remedy his predecessor's past alleged abuses." Dkt. 1551 at 13. He also argued, as he does in the Response, that no new exempt lists were needed because he and his predecessors had "already explicitly designate[d] all of their positions as either '*Rutan* exempt' or 'non-exempt' in each job description generated and maintained by the agencies' personnel division, the Department of Central Management Services." *Id*. at 22. To the contrary, there are admitted, serious problems in IDOT's employment system, both before Plaintiffs filed their motion in 2009 and after Governor Quinn assured the Court that he would end the violations that IDOT now admits. *See* n. 1, *supra*.[11]

We do not suggest that Governor Quinn or counsel intentionally misled the Court in 2009. But it is clear that their assurances, however earnestly made, cannot be relied upon in the face of the undisputed facts about IDOT's continuing violations of the Decree brought to light by the BGA's August 2013 report and subsequent events.

Second, the Governor claims that "appointing a special master to manage Governor Quinn's employment practices would deprive State officials of their responsibility." Response at 15. He also argues that the request for a monitor with power over all employment under the Governor, not just IDOT, goes too far. *Id*. at 17. Plaintiffs do not propose that the Court appoint a monitor with global authority to "manage Governor Quinn's employment practices" at this time. Plaintiffs ask the Court to appoint a monitor, not a receiver. Indeed, none of the Court's monitors have had authority to "manage employment practices." Rather, they have conducted

[11] Attached as Exhibit 5 is an anonymous letter received by Mr. Shakman the morning this brief was filed, which describes the extent to which patronage infects IDOT. A monitor is essential to reporting on and recommending remedies to this problem.

investigations, overseen employment practices and made recommendations. They have provided transparency, not command. As for scope, until more is known, Plaintiffs now only seek a monitor limited to IDOT. Plaintiffs should have an opportunity through discovery to determine whether IDOT's practices are the exception or the rule. Plaintiffs agree that the monitor should not be given authority at this point to "deprive State officials of their responsibility."

But experience in this case establishes that a monitor can help the Governor and IDOT determine why the violations occurred and how to correct them. That has been the history of the success achieved by this Court's monitors for the City, the Sheriff and the Forest Preserve District. All benefited from collaborative relationships with monitors. They helped elected officials correct serious patronage problems in their offices, without ever taking responsibility away from the elected officials and without need for the Court ever to enter a sanctions order. Sometimes elected officials need transparency and judicial encouragement to accept outside help to correct unconstitutional practices. The appointment of monitors strikes the right balance between doing nothing and imposing mandatory direction from the Court.

Third, the Governor suggests that by seeking to develop exempt lists we "conflate" the right to "litigate" what positions should be exempt, as permitted by the Decree, with the relief we request. Response at 18-19. We don't understand the argument. But to avoid any doubt, we assume that the Governor retains the right to propose classifying any specific position as exempt and retains the right to litigate exemptions. Again, experience with other defendants has shown that once the Court defines the parameters for treating a sample of job positions as exempt or not exempt, the parties resolve the status of most other positions by agreement, and can bring the remainder to the Court for a litigated decision.

Fourth, much of the Response focuses on whether the Plaintiffs have abandoned our 2009 motion, whether we are seeking relief with regard to the Blagojevich administration, and whether

the Plaintiffs have standing to seek to enforce a hiring remedy. The answers are:

(a) While Plaintiffs did not object to the Court's suggestion to strike the 2009 motion in light of the filing of the Amended Motion (See April 29, 2014 Order, Dkt. 3758), Plaintiffs did not "abandon" the 2009 motion any more than the Governor "abandoned" the arguments he made in response. Both sides chose to leave the Plaintiffs' 2009 motion (which the Amended Motion restates largely *verbatim* and expands upon) and the Governor's 2009 response pending, but not ruled upon. We cannot say why the Governor did not seek a ruling. Plaintiffs did not seek a ruling because Governor Quinn asserted, as his 2009 response indicates, that he wanted time to "remedy his predecessor's past alleged abuses." Until the BGA's 2013 report, Plaintiffs did not have evidence that he had failed to do so. Moreover, Plaintiffs could not proceed with discovery to evaluate the Governor's assurances. Plaintiffs served discovery on the Governor in 2009, the Governor objected and the Court stayed discovery; thus the usual method to develop relevant facts was foreclosed in 2009 at the Governor's request.[12]

(b) Plaintiffs are not seeking to remedy Governor Blagojevich's specific misconduct. We seek to remedy an employment system that continues many of Governor Blagojevich's practices in violation of the Decree. History is relevant to show the need for systemic reform and the inability or unwillingness of the Governor's Office to follow Court orders without a monitor.

(c) The named Plaintiffs recognize that the Seventh Circuit held in *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987) that they lack standing to bring a hiring claim "standing alone." But the Governor overlooks important caveats in the *Dunne* opinion, 829 F.2d at 1399 & n15 (italics added):

[12] There was no written order staying discovery in 2009. We recall that the issue was raised in an in-chambers meeting with counsel for the parties at which Judge Andersen stayed discovery in response to the Governor's request.

> . . . we explicitly note that *nothing in our holding today can be construed as affecting the continued validity of the Shakman decree*.
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> * * * * *
>
> This appeal involves only the plaintiffs' allegations that the defendants' hiring practice, *standing alone*, was unconstitutional. . . . This appeal did not involve the plaintiffs' contention that politically-motivated discharges by the defendants are unconstitutional. That issue was the subject of a consent decree with respect to many of the defendants, R. 42, and of the court's unappealed judgment with respect to other defendants. See supra note 3 [referring to the 1972 Decree]. *The district court continues to exercise jurisdiction to enforce its judgment with respect to those claims.*

The reference to "hiring practice, standing alone" is important. We emphasize the words because *Dunne's* holding was expressly based on the assumption that defendants, including the Governor, were in compliance with the Decree, including its rules against political firing and other actions with regard to persons who were already government employees. *See id.* at 1393:

> The combined impact of political hiring and firing practices – a significant part of the plaintiffs' original case – *is therefore not before us on this appeal.* This appeal raises only the constitutionality of politically-motivated hiring practices *without any reference to other patronage-based employment practices – including the discharge scheme now forbidden by the consent decree*, R.42; Consent Decree (May 5, 1972). [Italics added.]

Plaintiffs reserve the right to argue that the premise for *Dunne's* lack-of-standing-as-to-hiring ruling was an assumption that is no longer true: that the Decree barred politically motivated post-employment action by the Governor and other defendants so that the plaintiff-candidate class could not show that its members were harmed by political hiring standing alone. If that premise is wrong because the Governor or others in his administration have engaged both in political hiring and politically-motivated post-hiring actions in violation of the Decree, then the premise for lack of standing as to hiring is undercut; Plaintiffs would have such standing because of the direct impact on candidates of a politically-controlled public work force. To grant the relief we seek at this time, however, there is no need to reach this issue as to hiring alone.

What is important for purposes of the Motion is that *Dunne* expressly reaffirmed this Court's continuing authority to "exercise jurisdiction to enforce its judgment" with regard to claims arising from the Decree and the "continuing validity" of that Decree. The breadth of the Court's retained jurisdiction that is reaffirmed by *Dunne* is very broad. As the Court is aware, the Decree states in relevant part:

> E. Each and all of the defendants and others named or referred to in Paragraph C above are permanently enjoined from directly or indirectly, in whole or in part:
>
> (1) conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor.
>
> * * * * *
>
> H. Jurisdiction is retained for the following purposes:
>
> (1) To enable the parties to this Judgment to continue to litigate the following before this Court:
>
> > (a) Certain governmental employment positions under the jurisdiction of the defendants who are parties to this Judgment by their nature involve policy-making to such a degree or are so confidential in nature as to require that discharge from such positions be exempt from inquiry under this Judgment. Jurisdiction is maintained to litigate the question of which governmental employment positions under such defendants' jurisdiction are so exempt for the foregoing reasons.
> >
> > * * * * *
> >
> > (c) What remedies and implementing procedures ought to be granted and established by the Court in connection with the resolution of the questions raised in the foregoing subparagraphs (a) and (b)?
>
> (2) To enable the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the enforcement of compliance with the provisions contained herein, and for the punishment of the violation of any of such provisions.

Thus, the Decree retains its vitality and binding effect post-*Dunne.* Indeed, *Dunne* is expressly based on the assumption that the Decree is effective and is being enforced.

III. PLAINTIFFS' DISCOVERY SHOULD PROCEED.

The Governor argues that the Court should not assume that the problems at IDOT are symptomatic of all the jobs under his control. Response at 17. The only way to test that claim is by discovery.[13] A monitor, limited as Plaintiffs propose (for now) to IDOT, is not likely to provide an answer with regard to other government agencies. Plaintiffs have served document requests and a Rule 30(b)(6) deposition notice on the Governor's Office to obtain that information. *See* Exhibits 3 and 4 hereto. That discovery is appropriate and should be permitted to proceed. It seeks documents that constitute or refer to:

> (1) Political sponsorship in State employment, including information about specific State employees identified in the BGA report, or by other sources, as having political sponsorship that affects, or may affect, their employment in non-exempt jobs. (Requests 1-5, 10, 11, 35, 36, 37, 39).
>
> (2) The "audit" Governor Quinn stated in April 2014 that he had ordered following the BGA revelations, and the results of that audit. (Request 6).
>
> (3) Specific subjects referred to in the Schneider Interview of April 2014, including the names of the individuals appointed to *faux*-exempt positions and transferred non-competitively to non-exempt positions, IDOT's decision to stop hiring persons into *faux*-exempt positions, IDOT's investigation and its results, the basis for Secretary Schneider's statement that individuals in *faux*-exempt positions were not performing exempt functions, the political sponsorship of those individuals, and the names of persons who were "fired for not following the rules." (Requests 7-8).
>
> (4) The procedures and instructions given State employees related to determining what positions are exempt, and for hiring persons in exempt

[13] Recent revelations raise red flags. Today, the *Tribune* reported on a leaked report by the legislative inspector general that said, in relevant part, that Speaker Madigan had placed a political favorite at Central Management Services, the very agency involved in the process of exempt designations. Ray Long, *Madigan's Metra Influence Detailed in Report, Chicago Tribune*, July 8, 2014, http://www.chicagotribune.com/news/local/ct-speaker-mike-madigan-report-met-0708-20140708,0,4916151.story?page=2&r=2550E6907034H8V.

positions. (Requests 9, 13, 14, 16).

(5) Listings of positions that are purportedly exempt and their job descriptions; and documents dealing with interim, acting and other employment categories. (Requests 24, 39-42).

(6) How the Governor's Office deals with patronage requests, how personnel in the Governor's Office dealt with or participated in the specific practices described in the BGA report and the Motion, including the practices for dealing with employment of persons in purported exempt positions, including IDOT "staff assistants" and their reassignment and reclassification. (Requests 12, 15, 17, 18, 22, 23, 25-34, 38, 43).

(7) Information about IDOT's employment practices and personnel, including the bureaus in which persons holding purported exempt positions are employed, the organizational structure of IDOT, the names of IDOT employees, their assigned divisions, offices or bureaus. (Requests 19, 20, 21).

Plaintiffs also served a Rule 30(b)(6) deposition notice requesting the Governor's Office to designate a witness or witnesses to testify concerning these topics:

1. The practices and procedures followed by the Governor with regard to the hiring or removal of persons from positions of employment with the State of Illinois in exempt positions or in *Rutan*-exempt positions.

2. The practices and procedures followed by the Governor in designating or re-designating employment positions in IDOT as *Rutan*-exempt or non-exempt.

3. The practices and procedures followed by the Governor with respect to political sponsorship of individuals for employment by the State.

4. The involvement of the Governor in the hiring of staff assistants at IDOT.

5. The involvement of the Governor in causing the employment status of IDOT staff assistants to be changed from *Rutan*-exempt to another status.

6. Remedial steps taken or requested by the Governor with respect to the hiring or reclassification of positions of IDOT staff assistants from *Rutan*-exempt to other positions of employment.

The discovery sought is no broader than the issues raised by the BGA report, the Schneider Interview and the Governor's own acknowledgment that it was necessary to take

action because exempt positions might not be properly classified. Response at 16-17. Discovery is warranted by the fact that admitted manipulations of exempt positions have occurred.

Without discovery the Plaintiffs will be severely hampered in determining the scope of the Decree violations that have occurred, whether they are confined to the 60 positions discussed in the Schneider Interview, whether other State agencies suffer the same sort of manipulations for political purposes, and whether the obviously over-stated level of exempt positions (over 500 in IDOT alone) is typical of the State's misuse of the exempt classification. The discovery also seeks information on who is responsible for the misconduct that has occurred.

Thus, Plaintiffs seek information reasonably needed to litigate the extent of the violations, why they occurred, what positions should be exempt and what remedies are appropriate.

Conclusion

Plaintiffs request the appointment of a monitor for IDOT and authorization to proceed with the discovery they have served.

Dated: July 8, 2014

Respectfully submitted,

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