IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LOUIE E. AIELLO, BRIAN HUISMAN,
DEMIAN McDERMOTT, COREY KELLER,
DEAN SABIN, CODY VANDENBERG, and
CASEY FISHER, on behalf of themselves and
all others similarly situated,

Plaintiffs, ORDER

v. 98-cv-791-bbc

JON E. LITSCHER, Secretary,
Department of Corrections,
RICHARD VERHAGAN, Administrator,
Wisconsin Department of Corrections
Division of Adult Institutions,

Defendants.

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This prisoner class action was filed more than a decade ago, challenging the policy of the Wisconsin Department of Correction regarding publications that include depictions or descriptions of sexual activity or nudity. After I denied defendants' motion for summary judgment, Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000), the parties entered into a settlement agreement, which I approved. Dkt. #142. I dismissed the case without

prejudice, but retained jurisdiction to enforce the agreement. Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381-82 (1994); Kay v. Board of Education of City of Chicago, 547 F.3d 736, 737 (7th Cir. 2008). Since I entered that order in 2001, neither defendants nor counsel for plaintiffs have asked this court for assistance in enforcing the agreement.

Now before the court is a motion by defendants to "dismiss this action with prejudice." Dkt. #162. Defendants' argument has three parts: (1) when a case is dismissed without prejudice, the statute of limitations continues to run; (2) because the statute of limitations on plaintiffs' claims expired years ago, this case can no longer be refiled; and (3) if the case cannot be refiled, it should be dismissed with prejudice.

The first two parts of defendants' argument are well-established. Lee v. Cook County, Illinois, 635 F.3d 969, 971-72 (7th Cir. 2011) ("When a federal civil action is dismissed without prejudice, the statute of limitations runs continuously."); Malone v. Corrections Corp. of America, 553 F.3d 540, 542 (7th Cir. 2009) (statute of limitations in Wisconsin for claims under Constitution is six years). However, the third part of the argument does not necessarily follow from the first two.

On its face, defendants' request is an odd one. The case has been dismissed once and defendants do not cite any precedent for a court dismissing a case a second time. Perhaps what defendants are really asking is for this court to vacate the order dismissing the case

without prejudice and substitute it with a new order, but they do not cite any authority for doing that either.

Consider another common situation in prisoner cases: a dismissal without prejudice for a prisoner's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). If the prisoner fails to bring another lawsuit before the limitations period runs, does that mean that the defendants would be entitled to ask the court to convert the dismissal of the case to one that is with prejudice? Although I am not aware of any decisions on this issue, it would make little sense to do so. After all, even if a case is dismissed without prejudice, this has no effect on the ability of a defendant to raise a statute of limitations defense in a later case. Doss v. Clearwater Title Co., 551 F.3d 634, 638 (7th Cir. 2008) (noting that district court dismissed case on jurisdictional grounds "without prejudice" but that appeal was appropriate because "any new action that [the plaintiff] might try to bring would be barred by the three-year statute of repose by this time"). Thus, if a plaintiff tries to refile a case after the statute of limitations has filed, the new case can be dismissed on that ground. Converting the dismissal of the earlier case accomplishes nothing.

It seems that the real relief defendants want is a declaration that this court is relinquishing jurisdiction over the case and will no longer enforce the settlement agreement. This is the alternative requested by plaintiffs, but even that seems problematic. Generally, a federal court should not issue rulings except to resolve a concrete dispute between the

parties. Wisconsin Cent., Ltd. v. Shannon, 539 F.3d 751, 759 (7th Cir. 2008) ("[C]ourts should not render decisions absent a genuine need to resolve a real dispute.") (internal quotations and citations omitted). In this case, plaintiffs are not asking the court to enforce the settlement agreement and neither side cites any evidence that there is any chance they will do so. (Plaintiffs say that they will take any potential disputes over the agreement to state court in the future. Plts.' Br., dkt. #165, at 3 n.1.) In fact, all parties seem to agree that the settlement agreement is no longer enforceable in federal court, so a court order would serve no purpose.

It is not clear why defendants chose to file their motion now. The statute of limitations passed several years ago without comment from either side at that time or since. Defendants do not suggest that there is confusion regarding this court's continuing authority over the settlement agreement or any other new developments that require resolution. If the issue raised in defendants' motion ripens into a concrete dispute, the parties are free to raise the issue at that time. However, until then, no ruling from this court is needed or appropriate.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Jon Litscher and

Richard Verhagen, dkt. #162, is DENIED as unnecessary.

Entered this 18th day of May, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge