

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

ROBERT JOHNSTON, individually and on behalf  
of a class of all other persons similarly situated,

Plaintiff,

Case No. 14-cv-10427

v.

Honorable Thomas L. Ludington

DOW EMPLOYEES' PENSION PLAN and  
DOW CHEMICAL COMPANY RETIREMENT  
BOARD,

Defendants.

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**ORDER GRANTING PERMISSION TO AMEND MOTION TO CERTIFY CLASS,  
ACCEPTING AMENDED MOTION AS FILED, DENYING MOTION TO CERTIFY AS  
MOOT, GRANTING MOTION TO AMEND RESPONSE TO MOTION TO CERTIFY,  
DIRECTING FILING, AND DENYING MOTION FOR STATUS CONFERENCE AS  
MOOT**

On June 30, 2015, Plaintiff filed a motion to certify class. ECF No. 29. Since that motion has been filed, Plaintiff's legal representation has changed. Accordingly, on December 4, 2015, Plaintiff filed a motion to amend his motion for class certification. He seeks to amend his request for appointment of class counsel to reflect the current status of his legal counsel. ECF No. 123. Defendants do not object to the amendment.

Defendants have moved to amend their response to Plaintiff's motion to certify. They seek to amend certain factual information in their brief and amend an exhibit to their response—a chart “summarizing information relevant to the pension benefit calculations for Johnston and members of the putative class.” Defs.' Mot. Amend 1, ECF No. 80. Plaintiff opposes Defendants' request because, he argues, the exhibit is an improper expansion of Defendants' argument since it is an impermissible summary. Further, Plaintiff claims that Defendants had the

new information in their possession before they filed their response, making their amendment untimely.

Defendants' motion will be granted. First, Plaintiff did not move to strike the exhibit Defendants seek to amend at the time it was initially filed. He has only expressed displeasure with the exhibit's propriety in response to Defendants' motion to amend. Parties cannot seek affirmative relief in response briefs. See E.D. Mich. Electronic Filing Policies and Procedures R5(e). Thus, to the extent he objects to the document as improper under Federal Rule of Evidence 1006, he has missed his opportunity to do so.

But even if his Rule 1006 objection was entertained, it would be meritless. The document is properly considered a pedagogical device that falls, for purposes of motion practice, outside the purview of Rule 1006. See *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998). See also *United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006) (adopting pedagogical device holding from *Bray* and noting trial judges' broad discretion to admit summary exhibits). Defendants will be directed to file their amended response brief. Plaintiff will be permitted to file an amended reply.

Lastly, Plaintiff moved for a status conference in advance of trial. In the Court's most recent order, the final pretrial conference and trial dates were cancelled pending resolution of outstanding dispositive motions. Plaintiff's motion is now moot and will be denied as such. He is free to seek such a conference in the future if necessary and trial is approaching.

Accordingly, it is **ORDERED** that Plaintiff Robert Johnston is granted permission to amend his motion to certify class and the amended motion to certify class, ECF No. 123, is **ACCEPTED as filed**.

It is further **ORDERED** that Plaintiff Robert Johnston's motion to certify class, ECF No. 29, is **DENIED as moot** in light of his amended motion to certify, ECF No. 123.

It is further **ORDERED** that Defendants' motion to amend their response to Plaintiff's motion to certify, ECF No. 80, is **GRANTED**.

It is further **ORDERED** that Defendants are **DIRECTED** to file their amended response brief on the docket **on or before April 1, 2016**.

It is further **ORDERED** that Plaintiff Robert Johnston is **DIRECTED** to refile any amended reply brief **on or before April 8, 2016**.

It is further **ORDERED** that Plaintiff Robert Johnston's motion requesting status conference, ECF No. 157, is **DENIED as moot**.

Dated: March 23, 2016

s/Thomas L. Ludington  
THOMAS L. LUDINGTON  
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on March 23, 2016.

s/Michael A. Sian  
MICHAEL A. SIAN, Case Manager