STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 4

BROWN COUNTY TAXPAYERS ASSOCIATION and FRANK BENNETT,

Plaintiffs,

v. Case No. 18-CV-0013

BROWN COUNTY and RICHARD CHANDLER,

Defendants.

DEFENDANT RICHARD CHANDLER'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Court should deny the plaintiffs' motion for a temporary injunction against Brown County's sales and use tax. The plaintiffs do not meet the requirements for granting a temporary injunction because the alleged harm in this case is monetary, which is not irreparable, and the law provides an adequate remedy by allowing sales tax refunds. In addition, the plaintiffs are not seeking to preserve the status quo because the tax is now in effect.

The equities also favor denying the injunction. While defendant Richard Chandler, Secretary of the Wisconsin Department of Revenue (the "Department") takes no position on whether Brown County's tax complies with state law, it is not clear that an injunction against the tax would be the correct remedy even if the

plaintiffs are correct. Wisconsin law allows a county sales tax so long as it is "imposed only for the purpose of directly reducing the property tax levy." Wis. Stat. § 77.70. If the plaintiffs' contentions are correct, the appropriate remedy may be to direct the proceeds to be used for property tax relief rather than an injunction against imposition of the sales and use tax.

BACKGROUND

In order to understand the issues presented by the plaintiffs' motion for a preliminary injunction, some background is needed on the county sales and use tax, the Department's role in administering the tax, and procedures for refunds of the tax.

I. Statutory and administrative scheme for county sales and use taxes

A. Imposition of the county sales and use tax

State law provides that a county may enact a sales and use tax of 0.5%. Wis. Stat. § 77.70. The tax is referred to as a "sales and use tax" because it applies to both the sale of particular goods and services—the sales tax—as well as the use or consumption of those goods and services—the use tax. *See* Wis. Stat. §§ 77.52–77.53. Goods and services are only taxed once; the use tax is not owed if the retailer pays the sales tax. Wis. Stat. § 77.53(2).

In full, the statute authorizing the county sales and use tax provides that:

> Any county desiring to impose county sales and use taxes under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. The rate of the tax imposed under this section is 0.5 percent of the sales price or purchase price. Except as provided in s. 66.0621 (3m), the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy and only in their

> entirety as provided in this subchapter. That ordinance shall be effective on the first day of January, the first day of April, the first day of July or the first day of October. A certified copy of that ordinance shall be delivered to the secretary of revenue at least 120 days prior to its effective date. The repeal of any such ordinance shall be effective on December 31. A certified copy of a repeal ordinance shall be delivered to the secretary of revenue at least 120 days before the effective date of the repeal.

Wis. Stat. § 77.70.

This case involves the requirement that "the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy." *Id.*[1] Also relevant to this motion are the requirements that the ordinance must be delivered to the Secretary of Revenue at least 120 days prior to effective date (with the same requirement for repeal) and that the effective date must be the first day of a calendar quarter (with repeal only effective at the end of a calendar year). *Id.*

B. The Department's role in administration of county sales and use tax

1. Reporting and payment of the sales and use tax

While each county decides whether to impose a tax, the Department has "full power to levy, enforce, and collect county . . . sales and use taxes." Wis. Stat. § 77.76(1). The Department, however, does not collect money from Brown County retailers and transmit that money directly to Brown County.

Instead, the Department's payment to the county is based on a formula using the amounts *reported* to the Department, not the amounts actually collected. The statute specifically provides that the Department "shall distribute 98.25

[1] The exception in Wis. Stat. § 66.0621(3m) for counties that have an electronics and information technology manufacturing zone is not applicable here.

percent of the county taxes *reported* for each enacting county, minus the county portion of the retailers' discounts, to the county" from "the appropriation under s. 20.835(4)(g)," known as general program revenue. Wis. Stat. § 77.76(3).[2] While many filers pay the correct amount reported, not all filers pay the full amounts due with their reports. (Affidavit of Janet Abrams ¶ 7 ("Abrams Aff.").) The Department has the authority to collect unpaid or delinquent sales and use tax. Wis. Stat. § 77.62.

Generally, sales and use taxes are reported and paid quarterly, although a few retailers may do this monthly or annually. The general rule is that sales and use taxes "are due and payable on the last day of the month next succeeding the calendar quarter for which imposed," Wis. Stat. § 77.58(1). Large retailers, those with taxes exceeding $3,600 per quarter, report sales and use tax on a monthly basis, with the tax "due and payable on the 20th day of the month next succeeding the calendar month for which imposed." Wis. Stat. § 77.58(1)(b). For these retailers, the report and payments for January 2018 sales and use tax are due February 20, 2018. *Id.* Very small retailers with tax liabilities of $600 or less are only required to file annually. Wis. Admin. Code. § TAX 11.93(1).

[2] The Department withholds 1.75% of the payment "to cover costs incurred by the state in administering, enforcing, and collecting the tax." Wis. Stat. § 77.76(4). The retailers' discount, which compensates retailers for assisting in collecting the tax, is 0.5% of the tax collected, with a minimum of $10 and maximum of $1,000. Wis. Stat. § 77.61(4)(c).

The Department is required to make the payment to the county "no later than 75 days following the last day of the calendar quarter in which such amounts were reported." Wis. Stat. § 77.76(3). In practice, the Department makes monthly sales and use tax payments to counties. (Abrams Aff. ¶ 10.) The Department will pay counties, including Brown County, on February 28, 2018, based on all sales and use tax reports received between January 16 and February 15. (Abrams Aff. ¶ 11.) The Department's next payment to counties will be made on March 30 for sales and use tax reports received between February 16 and March 15, with a similar pattern for each subsequent month. (Abrams Aff. ¶ 12.)

2. Rate changes

The Department must notify sellers of any changes in the state sales tax rate "at least 30 days prior to the change's effective date and any such change shall take effect on January 1, April 1, July 1, or October." Wis. Stat. § 77.61(18). The Department is also required to provide at least 30 days of advance notice for changes to county tax rates. *See* Wis. Stat. §§ 77.79; 77.61(18). With respect to the Brown County sales and use tax, the Department began notifying the public of the changes in October 2017 by posting an article in the *Wisconsin Tax Bulletin* with an email notification sent to subscribers of electronic mailing lists, notifying Certified Service Providers and the Streamlined Governing Board, updating its website pages relating to county sales and use tax and tax rates, providing email notice to electronic filers of sale and use tax returns and a letter to paper filers, and notifying the Wisconsin Department of Transportation and the Wisconsin Department of

Natural Resources who collect tax on certain vehicle registrations. (Abrams Aff. ¶ 18.) The Department also updated its forms and instructions from November 2017 to January 2018. (Abrams Aff. ¶ 18.) The Department provided advance notice of changes to the Brown County sales tax rates because retailers need to adjust their systems for calculating and collecting the tax, which requires the updating of software, websites, applications, or even manual tables. (Abrams Aff. ¶ 19.)

C. Procedures for sales and use tax refunds

Both retailers and purchasers may file for sales and use tax refunds. A person may, with some exceptions, "file with the department a claim for refund of taxes paid to the department by that person" within four years. Wis. Stat. § 77.59(4)(a). The Court of Appeals interprets it to mean that "all persons who have paid an excess sales tax, whether to a retailer or to the department, may file a claim for a refund." *Dairyland Harvestore, Inc. v. Wis. Dep't of Revenue*, 151 Wis. 2d 799, 808, 447 N.W.2d 56 (Ct. App. 1989). The court "specifically infer[red] that the legislature intended through its amendment to permit customers who paid excess sales taxes to retailers to claim tax refunds from the department." *Id.*[3]

The claim has to be for at least $50 in refund (with some exceptions) and made on a form prescribed by the Department. Wis. Stat. § 77.59(4)(a). Purchasers must submit Form BCR with attached Schedule P. (Kamenick Aff. Ex. F.) The seller is supposed to sign the form as well, but the Department may waive this requirement. Wis. Stat. § 77.59(4)(a). The Department requires the seller to sign to

ensure that only one refund is given. *See Dairyland Harvestore*, 151 Wis. 2d at 809 ("The department should be able to develop a procedure by which the customer who files a claim with the department must show that the retailer will not also file a claim."). The Department has one year to act on a refund request. Wis. Stat. § 77.59(4)(a).

A seller requesting a refund must file an amended sales and use tax return either electronically in *My Tax Account* (the Department's online filing system) or on a paper Form ST-12. (Abrams Aff. ¶ 14 Ex. A.) If a seller files for refund, it has to remit refunds to buyers, or if not known, to the Department. Wis. Stat. § 77.59(5m).

The Department adjusts the amounts it pays to counties to account for refunds, including interest, which the Department pays to taxpayers. Wis. Stat. § 77.76(3) ("The county taxes distributed shall be increased or decreased to reflect subsequent refunds, audit adjustments, and all other adjustments of the county taxes previously distributed.").

II. Facts of this case

A. Parties

Plaintiff Brown County Taxpayers Association is an unincorporated nonprofit association of individuals, businesses and organizations who purchase and use goods and services in Brown County. (Compl. ¶ 4.) Plaintiff Frank Bennett resides in Green Bay and purchases goods and services in Brown County. (Compl. ¶ 5.)

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[3] A purchaser can also request a refund from a seller. Wis. Stat. § 77.59(9p)(b).

Defendant Brown County enacted the sales and use tax the plaintiffs are challenging in this case. (Compl. ¶ 6.) Defendant Richard Chandler is the Secretary of the Department, sued in his official capacity. (Compl. ¶ 7.)

B. Brown County sales and use tax

On May 17, 2017, the Brown County Board of Supervisors enacted an ordinance creating a 0.5% county sales and use tax that would go into effect on January 1, 2018. (Compl. ¶ 12 Ex. C.) The ordinance was signed by the Brown County Clerk on May 19, 2017, by the Brown County Executive on May 23, 2017, and by the Brown County Board Chair on May 24, 2017. (Compl. ¶ 13.) Brown County delivered a certified copy of the ordinance to Secretary Chandler on August 17, 2017, (Abrams Aff. ¶ 16 Ex. B), which was more than 120 days prior to the January 1, 2018, effective date.

The plaintiffs allege that the Brown County sales and use tax violates Wis. Stat. § 77.70 because it "is not being used in its entirety to directly reduce Brown County's property tax levy." (Compl. ¶ 26.) The plaintiffs allege that Brown County budgeted the sales tax to raise $22,458,333 in 2018, with $17,895,065 to be spent. (Compl. ¶ 19 Ex. D.) For 2018, Brown County set its property tax levy at $90,676,735, which is $438,272 under the county's levy limit. (Compl. ¶ 21.)

LEGAL STANDARD

Under Wis. Stat. § 813.02(1)(a), a court may only enter a temporary injunction if "it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or

continuance of which during the litigation would injure the party." In order to secure a temporary injunction, the movant must establish four elements: (1) "irreparable harm if a temporary injunction is not issued;" (2) "no other adequate remedy at law;" (3) "a temporary injunction is necessary to preserve the status quo;" and (4) "a reasonable probability of success on the merits." *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. A temporary injunction, however, should not "compel the doing of acts which constitute all or part of the ultimate relief sought." *Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) (quoting *Codept, Inc. v. More–Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964)).

Whether to grant or deny "injunctive relief is a matter of discretion for the circuit court." *Milwaukee Deputy Sheriffs' Ass'n*, 370 Wis. 2d 644, ¶ 20. Temporary injunctions "are not to be issued lightly. The cause must be substantial." *Slinger*, 210 Wis. 2d at 370 (quoting *Best Disposal Sys. v. Milwaukee Metro. Sewerage Dist.*, 128 Wis. 2d 537, 540, 386 N.W.2d 504 (Ct. App. 1986)). Further, the court should not grant an injunction "where the inconveniences and hardships caused outweigh the benefits." *McKinnon v. Benedict*, 38 Wis. 2d 607, 616–17, 157 N.W.2d 665 (1968) (quoting *Maitland v. Twin City Aviation Corp.*, 254 Wis. 541, 549, 37 N.W.2d 74 (1949)).

ARGUMENT

The court should deny the motion for a temporary injunction because the plaintiffs will not suffer irreparable harm—their only loss is money—for which they have adequate remedies at law—they can seek refunds of taxes paid. In addition, the current status quo is one in which the tax is being imposed; therefore, the plaintiffs do not seek to preserve the status quo, but rather to have this Court order all of the relief they seek. Lastly, the equities weigh in favor of denying the motion.

I. The plaintiffs will not suffer irreparable harm in the absence of a temporary injunction and have an adequate remedy at law.

The Court should not grant the temporary injunction because the plaintiffs will not suffer irreparable harm. "[A]t the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo *pendente* lite, the permanent injunction sought would be rendered futile." *Slinger*, 210 Wis. 2d at 371 (quoting *Best Disposal Sys.*, 128 Wis. 2d at 540–41). That is clearly not the case here, where the lack of a temporary injunction would not render the permanent injunction futile. This Court could enter a permanent injunction in this case even if it denied the temporary injunction.

At most, the plaintiffs would suffer the loss of money while the case is pending. The loss of money, however, is not irreparable harm. The United States Supreme Court holds that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against

a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Likewise, for over one hundred years, the Wisconsin Supreme Court has held that a party is not entitled to an injunction if it could be compensated by money. *Shepard v. Pabst*, 149 Wis. 35, 49–50, 135 N.W. 158 (1912).

Further, to the extent the plaintiffs are harmed by paying the tax while this case is pending, they are not without legal remedies. The plaintiffs, whether they are buyers or sellers, can seek refunds of the sales tax paid from the Department under Wis. Stat. § 77.59(4). *See Dairyland Harvestore,* 151 Wis. 2d at 808.

That the plaintiffs would have to fill out forms detailing their purchases so that the Department can verify their entitlement to refunds does not render their harm irreparable. (Pls. Br. 4.) Time and energy expended in the absence of an injunction does not constitute irreparable harm. *Sampson*, 415 U.S. at 90. Further, the plaintiffs are incorrect about several points. The process is not lengthy—the Department must act "within one year after the claim for refund is received by it," Wis. Stat. § 77.59(4)(a), and the Department can waive the requirement that the vendor also sign the refund form. *Id.* These alleged burdens are not any greater than the normal burdens a plaintiff in a lawsuit would face to recover damages.

The plaintiffs also incorrectly assert that sellers would incur irreparable harm because they have administrative burdens in collecting the tax. (Pls. Br. 5.) However, sellers are not harmed at all, let alone irreparably harmed, because they receive compensation for their role in collecting the tax in the form of the retailer's

discount (which includes the collection of county sales and use taxes). Wis. Stat. § 77.61(4)(c).

The plaintiffs' lack of irreparable harm contrasts with the harm to Brown County in not being able to impose the tax while the case is pending, should the tax ultimately be found to be legal. Brown County will have no feasible way to retroactively collect the tax on purchases that occurred while a temporary injunction is in place. While this harm is also monetary, the plaintiffs have not explained how Brown County could recover these losses.

II. The plaintiffs seek to change the status quo, not preserve it.

In addition the lack of irreparable harm, the Court should not enter a temporary injunction because the plaintiffs are not seeking to preserve the status quo. "The function of a temporary restraining order is to maintain the *status quo*, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157, 160 (1954) (quoting *State ex rel. Attorney General v. Manske*, 231 Wis. 16, 21, 285 N.W. 378 (1939)). In *Mogen David Wine Corp.*, the Wisconsin Supreme Court affirmed the denial of a temporary injunction because it "would have disturbed the *status quo*." *Id.* at 510. The plaintiffs here seek to disturb the status quo—which is one in which the tax is being imposed—to prevent collection of the tax.

In this case, the tax has been in effect since January 1, 2018, and the plans for implementation of the tax have been in effect for even longer. The ordinance

establishing the tax was delivered to the Department in August 2017. (Abrams Aff. ¶ 16.) The Department then communicated the new rate for Brown County to Brown County sellers in October 2017 to allow them to begin collecting the correct amount on January 1, 2018. (Abrams Aff. ¶ 18.) Those retailers will have to report their collection of the Brown County tax to the Department, who will then have to pay Brown County based on the amount of tax reported. (Abrams Aff. ¶ 20.) The plaintiffs' motion seeks to change all of this in favor of a state of affairs where no tax is collected. This request to "disturb[ ] the *status quo*," should be denied. *Mogen David Wine Corp.*, 231 Wis. 2d at 510.

The temporary injunction would also be improper because it would "have the effect of granting all the relief that could be obtained by a final decree." *Codept*, 23 Wis. 2d at 172. Temporary injunctions should not "compel the doing of acts which constitute all or part of the ultimate relief sought." *Slinger*, 210 Wis. 2d at 371 (quoting *Codept*, 23 Wis. 2d at 173). The Court would not simply be preserving the present state of affairs so the case can be litigated; instead, it would be granting the plaintiffs the relief they seek in the case.

III. Several equitable factors favor denying the motion.

A. The plaintiffs' right to the remedy requested is not clear.

The equities favor denying the motion because it is not clear, even assuming the plaintiffs' legal theory is correct, that the appropriate remedy would be an injunction against the sales and use tax. Wisconsin law plainly allows counties to impose a sales tax "for the purpose of directly reducing the property tax levy."

Wis. Stat. § 70.77. The Department does not take a position on either the plaintiffs' or Brown County's chances of success on the merits. But even if the plaintiffs are correct that Brown County's tax is illegal because it "is not being used in its entirety to directly reduce Brown County's property tax levy," (Compl. ¶ 26), the Court would not have to enjoin the sales tax to make the tax legal. An alternative remedy would seem to be an order directing the proceeds of the tax to be used for property tax relief. Given that temporary injunctions "are not to be issued lightly," and the "cause must be substantial," *Slinger*, 210 Wis. 2d at 370, the Court should not enter one ordering a remedy to which the plaintiffs may not be entitled should they win the case.

B. The inconveniences caused by the injunction outweigh the benefits.

Further, a temporary injunction in this case would be a recipe for confusion among Brown County retailers. The Court should therefore deny the injunction because "the inconveniences and hardships caused outweigh the benefits." *McKinnon*, 38 Wis. 2d at 616–17 (quoting *Maitland*, 254 Wis. at 549). Sales and use tax rates need to be communicated to retailers with sufficient lead time for them to alter their method for collecting the correct amount—whether that is software, mobile applications or even hand tables. (Abrams Aff. ¶ 19.) For this reason, Wisconsin law requires repeal of a county tax to take place at the end of the year, Wis. Stat. § 77.70, and the Department to provide advance notice for changes to county tax rates, Wis. Stat. § 77.79. A temporary injunction changing the rate that

retailers are supposed to collect will cause confusion among retailers selling in Brown County.

C. The plaintiffs' suggestion that the Department hold revenue in trust is not feasible.

The plaintiffs' alternative request that the Department "hold all revenue from the [Brown] County Sales Tax in trust, without disbursing it to the County," (Pls. Br. 7), is not feasible. The Department does not take the money received from the Brown County sales and use tax and then transmit that same money to the county. Instead, the Department pays Brown County out of state general program revenue funds based on the amounts reported, and not necessarily paid, by retailers. Wis. Stat. § 77.76(3). (Abrams Aff. ¶ 8.)

At most, the Department could track and maintain records of all Brown County sales and use taxes reported from January 1, 2018, and withhold the payment from Brown County. The plaintiffs, however, have offered no mechanism for what the Department is supposed to do with the money that retailers have collected and will transmit to the Department should the plaintiffs ultimately win. Should Brown County ultimately prevail, the payments to Brown County under a court order must continue to be subject to the requirement in Wis. Stat. § 77.76(3), such as the 1.75% administrative fee provided to the Department and the provision that that counties reimburse the Department for refunds, including interest, that the Department pays.

CONCLUSION

For the foregoing reasons, the court should deny the plaintiffs' motion for a temporary injunction.

Dated this 8th day of February, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
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Electronically signed by:

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the documents listed below with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

* Defendant Richard Chandler's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction

* Affidavit of Janet Abrams w/exhibits
  - Exhibit A
  - Exhibit B

I further certify that a copy of the above document was mailed on February 8, 2018, to:

N/A – All parties are registered users

Dated this 8th day of February, 2018.

Electronically signed by:

s/ BRIAN P. KEENAN

BRIAN P. KEENAN
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