STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

Brown County Taxpayers Association, *et al.*,
Plaintiffs,

v. Case No. 18-CV-13

Brown County, *et al.*,
Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

"Don't tax you, don't tax me, tax that fellow behind the tree!"

- U.S. Senator Russell B. Long

INTRODUCTION

Defendant Brown County submitted a brief on the topic of a preliminary injunction nearly twice as long as the Plaintiffs' opening brief. Yet remarkably little of it is devoted to explaining why the County's sales and use tax is lawful. Instead, the County spends most of its time (and most of the content of the three affidavits filed in support) trying to explain why paying for $147 million in new projects with a sales tax is a good idea. It says that the County "needs" this new spending. It argues, taking the new spending as a given, that it is more "fiscally responsible" to pay for it with the sales tax than borrowing. It points out that the sales tax is a way for Brown County to shift a portion[1] of the tax burden to people who live elsewhere (behind that tree) and had no say in whether the tax would be imposed.

[1] The County can't keep straight its claims in this regard. In its Motion to Dismiss Brief and supporting affidavit, it claimed that "non-resident visitors to Brown County will generate approximately 30% of the sales tax revenues derived from the sales categories in which they participate, including accommodations, food and beverage, retail, recreation/arts/entertainment." (Flynt Aff. ¶3; *see also* Brown County Br. in Support of Mot. to Dis. 3.) (Emphasis added.) In its Temporary Injunction Brief and supporting affidavit, it claims that "Brown County will receive approximately 30% of its sales and use tax revenues from visitors." (February 9, 2018 Ehlinger Aff., ¶6; *see also* Brown County Br. in Opp. to Mot. for Temp. Inj. 8.) The first version is the correct representation of the estimate.

Whatever the merits of these arguments as a matter of *policy*, they sidestep the *legal* issues before this Court. Using a sales tax to go on a spending spree may or may not be a wonderful idea, but the County's ability to do so goes no farther than the bounds set by the Legislature. "Because it would cost more to do it right" is no justification for unlawful behavior.

Here is the real question: Is the sales tax being used entirely to directly reduce the County's property tax levy? The County's own evidence shows it is not. The continued collection of this illegal tax causes harm that cannot adequately be remedied in any way other than stopping it now. This Court ought to enjoin the County's sales and use tax.

ARGUMENT

I) The Plaintiffs Will Succeed on the Merits

The County claims that the statutory language is "plain" but then utterly fails to even try to interpret the language or explain how "directly reduce" can be interpreted to mean "indirectly avoid raising." *See State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory interpretation begins with the language of the statute."). Instead, it offers its affiants' conclusory statements that the sales tax is somehow directly reducing the levy. (*See* Brown Co. Resp. Br. 23-24; Kocecny Aff. ¶14.) It is unclear how these government officials could ever offer "expert" opinion on statutory interpretation, but these statements cannot alter what is plainly true – the levy is going up, not down. The sales tax is being used to fund new spending. The statute's plain language does not permit that use.

"Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 2004 WI 58, ¶45. Dictionaries are an accepted source for the common,

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In fact, the report that is the source of that 30% number estimated that only 11% of overall sales tax revenue would come from visitors. (Third Heidel Aff. ¶5; Ex. A.)

ordinary, and accepted meaning of a statutory term. *See Id.*, ¶¶41, 53-54. "Direct"[2] means "stemming immediately from a source," "marked by the absence of an intervening agency, instrumentality, or influence." Webster's New Collegiate Dictionary, p. 320 (1981). "Reducing" means "to diminish in size, amount, extent, or number." *Id.*, p. 962. Therefore, to be lawful, a county sales tax must lead immediately to a diminishment in the amount of the property tax levy, with no intervening acts. Step one – impose the sales tax. Step two – decrease the property tax levy by the amount of the sales tax. Adding an intermediate step – a hypothetical increase to be avoided – is an intermediate step that makes the final result indirect.

The County's affidavits actually confirm that the County sales tax fails to meet either the "reduce" or the "direct" requirement. Brian Della admits that the total property tax levy still is increasing despite the sales and use tax. (Della Aff. ¶17; Exs. F, G.) Both Della and Michael Konecny admit that there are additional steps in between the sales tax and any downward pressure on the property tax levy. Konecny says that the sales tax "allows a County to avoid borrowing, which in turn avoids increasing the debt levy" (two separate steps, no reduction). (Kocecny Aff. Aff. ¶8.d.) Della says that the sales tax "abat[es] or eliminat[es] the increase in debt service," which counts as reducing the levy (another intervening step). (Della Aff. ¶¶11.d.)

In other words, to get to a reduction, Brown County must argue "assume we might have raised the levy instead." With that assumption in hand, the increased levy winds up lower than the hypothetical increase would have been. Of course, it is by no means clear that this supposed increase could actually have happened. As the Plaintiffs explained in their initial brief (P. Br. in Support of Mot. for S.J. 11-13), the County could not have raised its levy high enough to pay for all of this new spending without going to the voters for approval. While it could have borrowed the money, state law does not permit it to do so without also following prescribed procedures and

[2] "Directly" meaning "in a direct manner." Webster's New Collegiate Dictionary, p. 320 (1981).

surmounting specified hurdles. (*See Id.* at 13-15.) Whether or not the County could accomplish either is unknown. But even if it could, as the plain meaning and purpose of the statute make clear, the absence of an increase that might happen is not a direct reduction.

The County claims that the Plaintiffs are distorting the statute by reading "directly" as meaning "exclusively." But the County ignores the rest of that sentence in the statute, because that is exactly what it says. The statute by its language requires sales tax revenue to be used exclusively for property tax levy reduction, saying the sales and use taxes must be used "in their entirety" for that purpose. *See* Thesaurus.com, http://www.thesaurus.com/browse/exclusively (listing "entirely" as a synonym for "exclusively").

The County also argues that because other counties have done this previously, it should get a pass.[3] Past practice is neither evidence of nor argument for legality. Furthermore, the County is wrong when it claims that no counties have ever used their sales taxes to reduce their property tax levy. Attorney General Doyle's opinion describes some counties doing just that – in such counties, "[t]he countywide property tax levy is clearly reduced to the extent that the net proceeds of the sales and use tax are shown as a budget item which is subtracted directly from the total property tax before determining the net property tax that must be levied." OAG 1-98, 2. (Kamenick Aff. Ex. E.)

The County's arguments twist the meanings of "direct," "reduce," and "entirety" beyond all recognition. It employs that old political trick of calling a smaller-than-wanted-increase a "cut." Such rhetoric is common in the political arena, but it should not work in a court of law.

[3] The Konecny Affidavit includes inadmissible hearsay that other counties' compliance reports have not flagged any problems with using a sales tax the way Brown County does. (*See* Konecny Aff. ¶¶9-15.) The argument appears to be that if using the sales tax this way was illegal, compliance auditors would have flagged it in their reports; the absence of such flags is therefore proof that the sales tax can legally be used this way. Even aside from the obvious flaws in such an argument, Konecny's averments in that regard are inadmissible. *See* Wis. Stat. § 908.02. They are statements offered to prove the truth of the matter asserted – that the counties were in fact in compliance. *See* § 908.01(3).

II) An Injunction Would Preserve the Status Quo by Keeping the Money Where It Belongs

Both Defendants offer a model of the status quo requirement that, if valid, would prevent plaintiffs from ever enjoining illegal activity that had already commenced. They posit that because they have already started collecting the illegal tax, "preserving the status quo" means letting them continue to do so even if the tax is obviously unlawful. If the County had begun forcibly confiscating books and burning them, would they complain that a court had no power to enter an immediate injunction halting the practice? After all, the "status quo" would be that the government is seizing the books! Does that have to be preserved? Of course not.

In fact, the concept of preserving the status quo as envisioned by the Defendants flatly contradicts the language in Section 813.02, which states plainly that a court may restrain an action "that a party is doing" (emphasis added); *see also Joint Sch. Dist. No. 1 v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 311, 234 N.W.2d 289 (1975) (court can issue an injunction to halt an illegal act if "the injury sought to be avoided is actually threatened or has occurred.") (emphasis added). If, as the Defendants argue, once a defendant starts doing something, a court must preserve the status quo by allowing them to keep doing it, then that language means nothing. *See Kalal*, 2004 WI 58, ¶46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.").

In reality, preserving the status quo means preserving the existing rights of the parties. *See Shearer v. Congdon*, 25 Wis. 2d 663, 667-68, 131 N.W.2d 377 (1964). In *Shearer*, the defendant landowner installed a barrier on a road over which the plaintiffs claimed a prescriptive easement. *Id.* at 664-65. The trial court entered a temporary injunction prohibiting the defendant from continuing to bar access. The Supreme Court held that the trial court properly preserved the status quo by requiring the defendant to stop his illegal behavior. *Id.* at 667-69; *see also*

Connor v. Connor, 2001 WI 49, ¶5, 243 Wis. 2d 279, 627 N.W.2d 182 (also enjoining the ongoing obstruction of a road). Under the Defendants' theory here, these cases should have had the opposite result because the status quo in each was that the road was barred.

A court can enter a temporary injunction to halt the ongoing implementation of an illegal law. *See, e.g., Metro. Milwaukee Ass'n of Commerce, Inc. v. Milwaukee*, 2011 WI App 45, ¶5, 332 Wis. 2d 459, 798 N.W.2d 287 (temporary injunction halting sick-leave ordinance after it became effective); *Wis. Prosperity Network v. Myse*, 2012 WI 27, ¶1, 339 Wis. 2d 243, 810 N.W.2d 356 (per curiam) (noting that the Supreme Court had previously enjoined the GAB from enforcing an allegedly unconstitutional regulation). Other examples abound of courts temporarily enjoining ongoing allegedly-unlawful activity. *See, e.g., Ozaukee County v. Labor Ass'n of Wis.*, 2008 WI App 174, ¶3, 315 Wis. 2d 102, 763 N.W.2d 140 (temporary injunction halting ongoing administrative proceedings); *Joint Sch. Dist. No. 1 v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975) (temporary injunction halting an ongoing teacher strike); *Mercury Records Prods. v. Econ. Consultants, Inc.*, 91 Wis. 2d 482, 283 N.W.2d 613 (Ct. App. 1979) (temporary injunction halting the ongoing manufacture and sale of allegedly-pirated vinyl records). A tax can even be enjoined this way. *See Hafner v. DOR*, 2000 WI App 216, 239 Wis. 2d 218, 619 N.W.2d 300 ("The circuit court issued a temporary injunction prohibiting DOR from collecting the challenged taxes pending a decision on the merits of the plaintiffs' claims.").

Here, the Plaintiffs have their money in their own wallets, cash registers, and bank accounts. They have the right to keep it. The Defendants are not in possession of that money, and they have no legal claim to it. That is the status quo that needs to be preserved. Just because the Defendants have taken the first two dollars does not give them the right to take the next two

hundred. *See Threlfall v. Town of Muscoda*, 190 Wis. 2d 121, 126, 527 N.W.2d 367 (Ct. App. 1994) (town had already begun cutting down trees on plaintiff's property; court enjoined any further cutting). A temporary injunction will keep people's money where it currently is.

III) Irreparable Harm Will Occur Without an Injunction

Neither Defendant explains how the competitive harms to the business members of BCTA can be repaired or remedied. (*See* P. Br. in Support of Mot. for Temp. Inj. 5.) The Department argues that the "retailer's discount" is sufficient to compensate vendors for their administrative burdens, but does not establish that the tiny fraction a vendor can keep actually does fully compensate the vendor. And the Defendants have not denied that the time and expense of travelling outside of the County to avoid the illegal tax could not be compensated in a court of law.

As Plaintiffs discussed in their initial brief, (*see Id.* at 4-5), there is a refund process theoretically available that people could potentially use to recover their overpaid taxes. But despite the Defendants' attempts to show otherwise, the process is not merely inconvenient, but for all practical intents and purposes, impossible. Every single person who made a taxable purchase in the County during the pendency of the lawsuit would have to get receipts for each of those purchases. If the tax were eventually struck down, their options depend on how much tax they paid. If they paid less than $50 in county sales taxes they would have to make a claim against every single vendor for a refund. Wis. Stat. § 77.59(9p)(b). If they paid $50 or more (at least $10,000 in taxable purchases), they could ask for a full refund from the Department, but only after obtaining verification from every single vendor.[4] Wis. Stat. § 77.59(4)(a). Vendors can also request refunds, § 77.59(4)(a), meaning that the Department will have to resolve an

[4] The Department notes it has the statutory authority to waive the verification requirement. (Chandler Br. in Opp. to Mot. for Prelim. Inj. 6 (citing Wis. Stat. § 77.59(4)(a)).) The Department does not say it will waive this requirement or explain what criteria it uses to decide whether to exercise this discretion.

untold number of competing claims for the same money. Furthermore, if a vendor is supposed to refund sales taxes to consumers, but cannot locate them, that money must be remitted to the Department. § 77.59(5m). Common sense tells us that the vast majority of people affected by the tax will not apply for a refund, and those who do are highly unlikely to obtain full refunds.

IV) This Court Can Craft the Best Remedy

The Department questions whether enjoining the sales tax is the best remedy. (Chandler Br. in Opp. to Mot. for Prelim. Inj. 13-14.) This Court has wide discretion in crafting the best remedy. *See Shearer*, 25 Wis. 2d at 668. The remedy that best protects the Plaintiffs from this illegal tax is to immediately enjoin it so they no longer have to pay it, collect it, go out of their way to avoid it, or try and recover it after it is paid. The Department offers the alternative of directing that the sales tax proceeds "be used for property tax relief." (Chandler Br. in Opp. to Mot. for Prelim. Inj. 14.) If the Court were to consider that approach, the order would need to direct that the County reduce its levy by the amount of sales tax revenue it collects on a dollar-for-dollar basis. However, that route does not fully protect the public, as people who pay sales taxes, but not property taxes, would see no relief.

An alternative remedy would be to order the Department to track the amounts collected from the county sales tax and simply not disburse those funds to the County during the pendency of this lawsuit, which it acknowledges it is capable of doing. (Chandler Br. in Opp. to Mot. for Prelim. Inj. 15.) If the County wins this suit in the end, the money can then be paid to the County. If the Plaintiffs win, this Court may choose to order the County to reduce the property tax levy or it may strike down the tax altogether. In the latter situation, this Court can order the Department to refund the tax to the vendors based on the filed returns with instructions to refund the taxes to their customers to the best of their ability, or leave it up to the normal refund process

(perhaps ordering the Defendants to notify the public, to the best of their ability, of the availability of refunds).

The County complains of harms it will suffer if the injunction is granted. It claims vital "services" will be adversely affected, but its affidavits include no evidence supporting that claim – they do not mention services at all. An affidavit filed in support of the County's Motion to Dismiss avers only that two of the many capital projects funded by the sales tax are subject to some kind of contractual obligation. (Flynt Aff. ¶4.b., c.) Flynt's affidavit does not include copies of the contracts, which do not support the argument that the County would face a severe hardship if the tax were enjoined. The expo center contracts do not require Brown County to spend $15 million of sales tax revenue; rather, the contracts represent an agreement between the County and several municipalities regarding the commitment of room tax revenue. (Second Kamenick Aff. Ex. A, B.) Two of the three highway contracts were signed before the County budget was passed and any funds committed to specific highway projects. (*Id.*, Ex. C, D.)

The County complains that any of the proposed remedies leave it holding the bag for budgeted expenditures. While true, that is the hole the County dug for itself. It will have to best decide how to proceed, whether by amending the budget expenditures, borrowing, or going to referendum to raise the property tax levy. It cannot complain that its own violation of state law has left it in a difficult position.

V) The Bond Requested by the County is Oppressive

The County wants this Court to order the Plaintiffs to post a $147,000,000 bond if the Court enters a temporary injunction. One-hundred-forty-seven million dollars. The request should cause everyone to pause a moment and marvel that the government is demanding that ordinary citizens trying to protect themselves against abuse need to act as a surety for the

government. As the bond could only be required if the requisites for a temporary injunction are satisfied, that means citizens who have established that they are probably being taxed unlawfully and cannot practically recover that money can obtain relief only if they have a few million lying around. Apparently Brown County believes that only the extraordinarily rich have the right to effectively challenge the County in court.

Let's return to the real world. Plaintiff BCTA has net assets under $5,000. (Third Heidel Aff., ¶3.) It is being represented for free by a public interest law firm. A bond like that would effectively prohibit it from obtaining the injunction to which it would otherwise be entitled. The Plaintiffs cannot post a bond in that amount or anywhere near (or even quite far) from that amount. Requiring them to do so would deny their motion solely because they lack the wherewithal to seek justice. That would raise grave due process concerns.

What "damages" is the County even facing? Losing tax revenue surely isn't a form of "damages" that the government could actually get a court to order the Plaintiffs to pay. What cause of action would allow that? And the County doesn't even have to lose that revenue. It has multiple lawful ways of obtaining the money if it still wants to spend it, including borrowing and raising the levy to pay for debt service or getting permission to raise the levy through referendum. If it wins, it could even reimpose the sales tax for another six years and collect just as much, if not more (given reasonable growth in economic activity) revenue.

And as noted earlier, any hole the County finds itself in is one it dug itself. It included the "poison pill" in the sales tax ordinance that makes it automatically expire if the County borrows new money. The Plaintiffs are not responsible for that. The County passed this sales tax in the first place despite being warned by the Plaintiffs that it was unlawful. (*See* Pl. Br. in Opp. Brown County's Mot. to Dismiss 7-8.)

In the end, the bond amount is left to the discretion of the court. *Nauman v. Central Shorewood Bldg. Corp.*, 243 Wis. 362, 365, 10 N.W.2d 151 (1943). If the Court sets any bond, Plaintiffs request that the Court set it at $100. If this Court is truly concerned with hardship that may befall the County, this Court can order the Department to hold sales tax funds in trust. If this Court concludes that the Plaintiffs are likely to succeed in their challenge to the county sales tax, yet is still worried about ramifications if it eventually upholds the tax, this remedy provides sufficient protection to the County.

CONCLUSION

The sales and use tax is illegal because it did not result in a reduction of the tax levy. The Plaintiffs request that this Court enjoin collection of the illegal tax.

Dated this 16th day of February, 2018.

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