STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY,
Plaintiff,
v. Case No. 18-CV-640

BROWN COUNTY TAXPAYERS ASSOCIATION, et al.,
Defendants/Third-Party Plaintiffs
v.

PETER BARCA, Secretary,
Wisconsin Department of Revenue,
Third-Party Defendant.

DEFENDANTS/THIRD-PARTY-PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OR CLARIFICATION OF THE COURT'S MARCH 24, 2020 DECISION AND ORDER

PLEASE TAKE NOTICE that Defendants/Third-Party Plaintiffs Brown County Taxpayers Association ("BCTA") and Frank Bennett (collectively, the "Defendants"), by their attorneys, the Wisconsin Institute for Law & Liberty, hereby move for reconsideration or clarification of the Court's March 24, 2020 Decision and Order pursuant to the Court's inherent authority and Wis. Stat. §§ 802.08 and 806.07(1)(a) and (h). As grounds for this Motion, the Defendants state as follows:

1. On March 24, 2020, this Court issued a decision and order granting Plaintiff Brown County's (the "County") motion for summary judgment and denying the Defendants' motion for summary judgment. Dkt. #119 ("Decision").

2. In multiple parts of its decision, the Court set forth as "an observation of fact" that the Defendants had failed to explain to the County, prior to the institution of this case, that it viewed the County's sales tax as unlawful. *Id.* at 24. For instance, the Court explained that it was "not the proper venue for the [Defendants] to have started their campaign," *Id.* at 23; that the

Defendants "had ample opportunity to present their interpretation of Wisconsin Statute section 77.70 to any one of the 26 county supervisors or to the County Executive," *id.*; that the Defendants "could have held their own town hall meetings," *id.* at 23-24; that the Court "believe[d] that it is the first audience to hear the [Defendants] full argument," *id.* at 24; that the Defendants "could have put the same effort towards persuading voting taxpayers, county supervisors, or the County Executive" as it did "persuad[ing] this Court," *id.* at 24; and that the Defendants "did not avail themselves of the opportunities to dialog with their elected officials and present their argument to them," *id.* at 31-32.

3. The Court based these observations on the fact that county officials, in their discussions of the issue, did not "discuss[] an interpretation of Wisconsin Statute section 77.70 that aligns with the [Defendants'] position at the May 8, 2017, County Executive's presentation," *id.* at 24, and the lack of contrary evidence in the record, *see id.* at 31. But the fact that the county officials did not discuss the Defendants' view does not mean that that view was not expressed to those county officials in advance of this lawsuit. As demonstrated below, it was.

4. For example, on May 10, 2017—prior to the May 17, 2017 meeting at which the sales tax ordinance was adopted—Defendant BCTA sent a letter to *every single one* of the 26 Brown County supervisors setting forth objections to the County's proposed sales tax *and* released the letter to the public via a press release sent to local media. Second Affidavit of Richard Heidel at ¶3, *Brown County Taxpayers Association v. Brown County*, No. 18-cv-13 (Brown County Cir. Ct. February 2, 2018). The letter specifically questioned the legality of the tax under Wis. Stat. § 77.70.

5. This affidavit was submitted to another branch of this Court on February 2, 2018 and a duplicate of the affidavit (with the court's file stamp) is attached hereto.[1]

6. And that's not all. BCTA's executive committee *also* telephoned each supervisor to express the same concerns, either speaking with the supervisors directly or leaving voicemail messages. *Id.* at ¶4. Further, a member of BCTA's executive committee, Dave Dillenburg, personally spoke with the County's Director of Administration at Mr. Dillenburg's house prior to the enactment of the sales tax and informed the Director that the sales tax was illegal under state law because it was not being used to lower the property tax levy. Affidavit of Dave Dillenburg ¶4, *Brown County Taxpayers Association v. Brown County*, No. 18-cv-13 (Brown County Cir. Ct. February 2, 2018).

7. Just as with the affidavit of Mr. Heidel this affidavit was submitted to another branch of this Court on February 2, 2018 and a duplicate is attached hereto.

8. The Defendants acknowledge the Court's statement that its conclusions were grounded upon what the Court could "surmise based on the record before it." Decision 31. In other words, the facts alleged by the Defendants above were not in the record when the Court made its decision. By the same token, however, there was nothing in the record that established that the Defendants did *not* dialog with County officials, either.

9. The facts pertaining to the Defendants' pre-litigation advocacy were not in the record in this case (as they had been in the previous case before Judge Atkinson) because the

[1] The affidavits submitted herewith were filed in connection with the earlier-filed and dismissed case before Judge Atkinson referenced in this Court's decision. Decision at 2. These facts relating to the Defendants pre-litigation activities *were* relevant in that case because, as this Court explained, the parties were litigating whether the County had received advance notice of the lawsuit against it.

County never argued during this litigation that that advocacy had anything to do with this suit and the Defendants' pre-litigation advocacy was not the subject of briefing or argument in this case.[2]

10. The Court explained that it was mentioning the Defendants' putative failure to apprise the County of its position prior to litigation because "it would be an unacceptable usurpation of the legislative process for this Court to und[o] the County's thoughtful and intensive legislative process—especially in light of the substantial effort the [Defendants] have gone in this case to persuade this Court, when it could have put the same effort towards persuading voting taxpayers, county supervisors, or the County Executive." *Id.* at 24; *see also id.* at 22 (usurpation would be an "unreasonable result"); *id.* at 31 ("[T]o usurp the legislative decision-making process from the Brown County Board is not this Court's role.").

11. While the Defendants respectfully disagree with the Court as to the Court's legal conclusion, they do believe that it is necessary to correct the record as to their efforts to inform the County of the illegality of what the County was doing prior to the lawsuit, especially given the Court's emphasis on this factual matter in its Decision.

12. Moreover, the items discussed above were not the only public advocacy in which the Defendants engaged. In June of 2017 BCTA sent a letter to each of the members of the Green Bay City Council objecting to the sales tax. Second Affidavit of Richard Heidel at ¶5. And the Brown County Executive, Troy Steckenbach, appeared at BCTA's regular monthly meeting in

[2] The closest the parties came to discussing the Defendants' substantial pre-litigation activities in this regard were a brief pair of references by the County in a single filing in this lawsuit—one reference occurring in a footnote, the other in a parenthetical—to certain of the meetings the County held before adopting the sales tax and to who had spoke in opposition to the tax at them (not the Defendants). *See* Pls.' Brief in Opposition to Defendants/Third-Party Plaintiffs' Motion for Summary Judgment, Dkt #75 at 15 n.13 and 16. As evidenced by the heading of that section, however, the County's purpose in discussing the meetings was to attempt to establish its contention "that revenues from the sales and use tax directly reduce the property tax levy," *id.* at 14 (capitalizations removed) and that it had acted "in a deliberate and transparent fashion," *id.* at 17. The County did not attempt to suggest there or anywhere else that the Defendants had failed to object to the sales tax prior to this suit; as discussed, that suggestion would have been false and the Defendants would have refuted it.

December of 2017 with the County's Director of Administration, was given time to speak, and asked BCTA not to sue the County. Affidavit of Dave Dillenburg ¶8.

13. Thus, BCTA devoted substantial effort to publicly dialoguing with County officials over the sales tax prior to the filing of this lawsuit, and the Court's reliance on a factual assumption to the opposite led to an improper result in this case.

14. The Court's discussion of the Defendants' pre-litigation activities was not a minor item and its importance to the Court was shown in several parts of the Decision. For example, the Court explained that the Defendants' supposed failure to confer with County officials would result in "an unacceptable usurpation of the legislative process for this Court to und[o] the County's thoughtful and intensive legislative process." Decision at 24. The Court further characterized this usurpation as an "unreasonable . . . result," *id.* at 22, referring to its earlier-cited legal proposition that "statutory language is interpreted . . . reasonably, to avoid . . . unreasonable results," *id.* at 19 (quoting *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, 46, 271 Wis. 2d 633, 681 N.W.2d 110).

15. Because this Court's decision was premised, at least in part, on a false assumption about what the Defendants did or did not do prior to the institution of this suit, the Defendants' rights have been unfairly prejudiced and this Court should reconsider its decision with the benefit of a complete understanding of the Defendants' substantial efforts to dissuade the County from adopting its illegal sales tax.

16. The Defendants recognize that the Court's decision references a number of other grounds as supportive of its ultimate conclusion but the Defendants have no way of knowing the extent to which the result was based on the false assumption as to the facts.

17. Even assuming that the Court's decision would remain unchanged regardless of whether or how the Defendants presented their views to the County prior to this suit, the Defendants are, in fairness, entitled to a clarification of this fact and acknowledgement that (at the very least) the record prior to the Court's decision does not show one way or the other what the Defendants may or may not have done prior to the filing of this suit.

18. The Defendants may appeal this Court's decision and if the record and the Court's Decision is not clarified, the Court of Appeals could end up making the same faulty assumption.

19. The Defendants would then be left in the untenable position of having to appeal a decision premised on a factual error, with no way to correct the record.

For the foregoing reasons, the Defendants respectfully request that this Court reconsider or clarify its March 24, 2020 Decision and Order. The Defendants do not intend to file a separate brief in support of this motion.

Dated this 31st day of March, 2020.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Defendants/Third-Party Plaintiffs

Electronically Signed by Richard. M. Esenberg
Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Anthony F. LoCoco, WI Bar No. 1101773
414-727-7419; alococo@will-law.org
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385

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.

SECOND AFFIDAVIT OF RICHARD HEIDEL

STATE OF WISCONSIN)
) SS
BROWN COUNTY)

Richard Heidel, being duly sworn on oath, states as follows:

1. I have personal knowledge of the facts set forth in this affidavit.

2. I am the current President of the Brown County Taxpayers Association ("BCTA").

3. On May 10, 2017, BCTA sent a letter to each of the 26 Brown County supervisors outlining our objections to the County's proposed sales and use tax. A true and accurate copy of that letter is attached as Exhibit A. We also released the letter to the public via a press release sent to local media.

4. BCTA's executive committee, which I am a member of, also telephoned each supervisor to express the same concerns in the May 10, 2017 letter, speaking with the

supervisors or leaving voice mail messages. I personally called between four and six supervisors, including Bernie Erickson, Aaron Linssen, and Dave Kaster.

5. On June 17, 2017, BCTA sent a letter to each of the members of the Green Bay City Council, objecting to the sales tax and asking the City to consider whether to agree to divert room tax revenues for the financing of a new expo center (a condition placed on the sales tax). Four members of the City Council were also Brown County Supervisors. A true and accurate copy of that letter is attached as Exhibit B.

6. I reside in Brown County and make regular, daily purchases in the County. I have continued making purchases on a daily basis from vendors and retailers in the County since the county sales tax went into effect on January 1, 2018 and I've had to pay the additional tax on those purchase.

Richard Heidel

Subscribed and sworn to before me
this 1 day of February, 2018

Notary Public, State of Wisconsin
My Commission expires 3/16/2018.

The Brown County Taxpayers Association
P.O. Box 684
Green Bay, WI 54305-0684
On the web: bctaxpayers.org

May 10, 2017

Brown County Supervisor:

Regarding the active discussion concerning the Brown County Memorial Veterans Arena (the "Arena") replacement and financing plan, the Brown County Taxpayers Association position at this time is that the proposed financing plan is being advanced at a dangerously rapid speed **and we oppose any Brown County Board vote – yea or nay – at its May 17th meeting.** Such a vote would come merely 15 days after being formally presented at the State of the County address. Eight (8) public hearings on this issue scheduled over just the next seven days simply does not allow sufficient time for proper debate and vetting.

With all of the commercial and governmental entities articulating their positions on the current proposal for replacing the Arena and the funding of that project along with a raft of other significant projects, we take very seriously our role as the advocate for the individual Brown County taxpayer. This proposal represents $126 million in <u>new</u> taxes, as noted below.

The Association understands and concurs with the need to replace the existing Arena. Of far more concern to us is the proposed method of financing that project and the other eight (8) projects being advanced – any one of which would need to stand on its own legs for proper vetting by the appropriate Brown County Board committee and eventual County Board scrutiny and vote.

Examples of a number of unanswered questions are the following:

- What happens if the other six (6) municipalities, that must commit to applying their room tax revenues to the Arena replacement, don't do so?
- Can the current Board absolutely obligate future Boards to not extending the 72-month sales tax or to no property tax rate hike?
- Why can't the room tax be increased to cover a $15M gap in financing the Arena replacement?
- What happens to the proposed monies for, say, the jail, mental health, or library branch upgrades, if they don't survive eventual Board votes?
- How many of these projects have been adequately scoped and estimated? For example, if, as County Executive Streckenbach stated in his address, the Public Works Department has developed a five-year plan to bring all of Brown County Roads and bridges into a Pacer Rating of good to excellent and is still on schedule, how is it that $60M must now be proposed for road and facility Infrastructure? Has the Planning, Development, and Transportation Committee vetted this proposed

EXHIBIT A

amount? What is its basis? This is just one example of, what we believe to be, inadequate planning and public review.

- Does the County Executive's proposal conform to Wisconsin state statutes? The relevant State statute reads, in part: "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." (Wis stats 77.70; emphasis added) The County Executive's proposal imposes over 20 million dollars per year in new sales taxes, yet the indicated reduction in property tax levy is trickled in over six years and only reaches 5.9 million dollars in the final year. Over the six year period, sales taxes are estimated at 147 million dollars. Property tax levy reduction over that same period of time appears, by the Executive's own documents, to total about 21 million dollars. That is 126 million dollars in new taxes. Is the County Board convinced that, given the language of the statutes, this proposal conforms to the statutes and would survive a court challenge?

These are just a few questions which, we believe, need to be satisfactorily answered before you can articulate your position and prudentially vote.

It's noteworthy to observe that bonding on any one of these individual projects would normally require 3/4 majority (20 votes) standing on its own merits. Yet, you're being asked to provide a simple majority approval on a package valued at $147M in the aggregate, with very little public debate. This "ready, shoot, aim" approach isn't the hallmark of a county government that has earned the Moody's Rating of Aaa, which Brown County has achieved.

We encourage you to put off a vote on this plan at your May 17th County Board meeting until such time that all questions have been considered and properly answered. Indeed, this question may be most effectively answered by public referendum.

We thank you for your consideration.

On behalf of the Brown County Taxpayers Association,

Richard R. Heidel
President

Brown County Taxpayers Association
P.O. Box 684
Green Bay, WI 54305-0684
Web: www.browncountytaxpayers.com
Email: bcta@execpc.com

June 17, 2017

Members of the Green Bay City Council:

The Brown County Taxpayers Association (BCTA) is a county-wide organization comprised of taxpaying volunteers who take seriously government's authority to tax its citizens and how, when taxed, that money is spent. In short, we are a watchdog organization that, among other things, wants public taxing policy to be held up to the sunlight and understood. Such is not the case with Brown County's recently approved sales tax.

Because of the County's recent sales tax coup, now you are being asked by the County to act upon the requirement for the City of Green Bay to divert room tax revenues for the financing of a new expo center. Four of you, who also serve on the Brown County Board, initially and prudently voted at your May 17th County Board meeting to delay action until the proposed package could be vetted out and the public's will be better known. You lost that vote - BUT you are to be commended for your responsible approach in dealing with such a monumental and impactful package. You dissented from the County Executive's "Ready, fire, aim!" approach. This evening you have a second "kick at the same cat" – how unique and fortuitous is that! We ask that you and your other eight colleagues slow this down for proper evaluation and discussion.

Numerous issues abound. Among them, and perhaps the most troubling and problematic, is the lack of analysis and definition behind the estimates for each of the other eight County projects identified to benefit from the $147M total proposal for which only $15M (10%) is going to the expo center. More homework went into developing the $15M estimate for the expo center than went into the other $132M for the other eight projects, which is either too much or too low - which do you think? What is intended for any excess sales tax revenues collected? Why not levy a sales tax exclusively for the expo center: shorter in duration and less in amount collected? Since when is the delivery of the County's core services, (e.g., library, jail, roads, health services, etc.) to be paid for by a

EXHIBIT B

sales tax? If that's such a great idea, let's do away with property taxes completely and use sales tax revenues for the delivery of ALL County services. And the fact that non-County residents pay a portion of the sales tax is true, BUT grossly and recklessly overstated. Using numbers from the Department of Tourism, Brown County, and Brown County's consultant (AECOM Report - pgs. 82-83), the amount paid by non-residents is approximately 11% - NOT the oft-heard 25-30%!

In summary, the BCTA is not opposed to a replacement for the Brown County Veterans Memorial Arena. However, we ARE opposed to the intentional blitz and lack of scrutiny with which the entire package has been rolled out. We request that YOU do what a majority of the Brown County Board did NOT do: slow this careening train down, ask the obvious questions, demand answers, and, most of all, advocate for the best interests of your 9,000 tax-paying respective constituents. You were elected to do their bidding – not the County's.

Sincerely,

Rich Heidel
BCTA – President

cc: Mayor Jim Schmitt

Exhibit 2

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.

AFFIDAVIT OF DAVE DILLENBURG

STATE OF WISCONSIN)
) SS
BROWN COUNTY)

Dave Dillenburg, being duly sworn on oath, states as follows:

1. I have personal knowledge of the facts set forth in this affidavit.

2. I am the current Second Vice President of the Brown County Taxpayers Association ("BCTA").

3. BCTA's executive committee, which I am a member of, telephoned each supervisor to express the same concerns in the May 10, 2017 letter (attached to the Second Heidel Affidavit as Exhibit A), speaking with the supervisors or leaving voice mail messages. I personally called about four of them.

4. Before May 17, 2017, Brown County Director of Administration Chad Weininger came to my house to speak with me. Mr. Weininger came over to explain why the County wanted to have a sales tax and was seeking my support within BCTA for the proposed sales and use tax.

5. I told Mr. Weininger that the tax was illegal under state law because it wasn't being used to lower the property tax levy.

6. On December 21, 2017, BCTA held its regular monthly meeting, which are always open to the public. I was in attendance at that meeting.

7. Mr. Weininger and Troy Streckenbach, the Brown County Executive, attended that meeting.

8. Mr. Streckenbach was given the floor and allowed to address the Association. He spoke for about five minutes. He stated that he already knew BCTA was planning on suing the County over the sales tax. He argued that the sales tax saved taxpayers money by avoiding borrowing and debt service payments, and asked BCTA not to sue the County. He said he would defend the tax if sued.

9. After the meeting, Mr. Weininger approached me. We talked about several things, and Mr. Weininger tried to steer to the conversation to the coming lawsuit, but I did not want to talk about it with him.

10. I have made a lot of purchases already since the sales tax went into effect on January 1, 2018 and have had to pay the additional county sales tax on them.

Dave Dillenburg

Dave Dillenburg

Subscribed and sworn to before me
this 31 day of January, 2018

Cindy M. Kachel

Notary Public, State of Wisconsin
My Commission expires 3/16/2018.