STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY TAXPAYERS ASSOCIATION, et al.,

Plaintiffs,

vs.

Declaratory Judgment
Case No. : 18-CV-13
Case Code: 30701

BROWN COUNTY, et al.,

Defendants.

DEFENDANT BROWN COUNTY'S BRIEF IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

Defendant, Brown County, ("Brown County") submits this brief in opposition to Plaintiffs, Brown County Taxpayers Association and Frank Bennett (collectively "Plaintiffs") motion for a temporary injunction. As discussed in greater detail below, and as demonstrated in the affidavits filed contemporaneously herewith, Plaintiffs have shown no ability to satisfy the four elements necessary for a temporary injunction to issue.[1]

While Plaintiffs' motion is for temporary injunctive relief, what they are actually seeking is complete relief. Indeed, if Plaintiffs were to prevail on their motion, the sales and use tax Ordinance would sunset, or lapse, permanently as a matter of law. Such a result would be tantamount to a final judgment on the merits and have a devastating impact on Brown County's operations, budgeting, and its citizens. Simply put, the impact of a temporary injunction will

[1] Putting aside the substantive defects to their legal arguments, Plaintiffs have also failed to comply with Wis. Stat. § 893.80's notice of claim, a procedural prerequisite to any suit. Defendant's motion to dismiss is concurrently pending.

mean that Brown County would no longer have a balanced budget, pending capital projects would be halted, and key emergency services, such as 911 services, jail, and infrastructure projects, would be significantly adversely impacted. In the long term, Brown County residents will be forced to pay more than $40 million in interest payments for the capital projects that are currently being funded with sales and use tax revenues because of Plaintiffs' insistence that Brown County should issue debt to fund these critical projects. Moreover, an estimated $70 million dollars in debt reduction that would otherwise be realized under the sales tax plan would be lost.[2] In sum, Plaintiffs' claims lack not only legal merit, but the very real and practical implications of Plaintiffs' desired relief would be financially disastrous to the County and its taxpayers.

Wisconsin follows a four prong test to determine whether a temporary injunction should issue. A movant must (1) demonstrate a likelihood of irreparable injury if the injunction is not granted; (2) establish that there is no adequate remedy at law; (3) prove that an injunction is necessary to preserve the status quo; and (4) show a reasonable probability of success on the merits. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Plaintiffs cannot meet their burden of satisfying even one of these prongs. First, the only irreparable injury that would occur if an injunction is issued would be to Brown County and Brown County property taxpayers. Second, Plaintiffs have an adequate remedy at law vis-à-vis the statutory sales tax refund process and the county budget process. Third, Plaintiffs' request for relief actually upsets the current status quo where the Ordinance is in effect and taxes are being collected. Finally, Plaintiffs cannot show a reasonable probability of success on the merits

[2] The County, by using sales tax revenue to pay debt service, is required by law to reduce the general levy by the amount of debt service retired each year, but if the sales tax is enjoined, then that significant reduction in the general levy will not be realized.

because there is simply no merit to Plaintiffs' desire to revisit the long-established policy and practice of a Wisconsin county's collection and use of sales and use tax proceeds.

For these reasons, as discussed in further detail below, this Court should not issue a temporary injunction.[3]

FACTS

Despite seeking to wholly disrupt an anticipated $147 million revenue stream to support the Brown County budget, Plaintiffs ignore many relevant facts, mischaracterize the history of the sales and use tax in Wisconsin, and wholly disregard the significant efforts the County expended to study the issue prior to the May 2017 enactment of the sales and use tax and discount the County's detailed 2017 budgeting process. This Court is entitled to a full exploration of all relevant facts before making a decision on perhaps the most important court case in which the County has ever been involved.

A. Wisconsin County Finance Basics

1. Wisconsin County Sales and Use Tax

In 1985, the Wisconsin Legislature enacted Wis. Stat. § 77.70 which authorized counties to enact a sales and use tax by adoption of an ordinance.

Section § 77.70 states as follows:

> 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

[3] Notably, it is obvious that Plaintiffs' brief was actually drafted in 2017, before the sales and use tax began to be collected, and despite admitting that they voiced concerns to this sales and use tax in May 2017, they waited until January 2, 2018, to file this case to ensure that maximum damage to the County would be done. As an example, Plaintiffs use such language as "earlier this year" referring to 2017 in their brief. (Pl. Br., p. 3).

> 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. Except as provided under s. 77.60(9), the department of revenue may not issue any assessment nor act on any claim for a refund or any claim for an adjustment under s. 77.585 after the end of the calendar year that is 4 years after the year in which the county has enacted a repeal ordinance under this section.

(Emphasis added).

Currently, 66 of Wisconsin's 72 counties have adopted a sales and use tax. (Della Aff., ¶ 4, Ex. A). When signed into law, then Governor Tony Earl was reported to have stated that he had hoped the county sales tax would become a vehicle to *hold down property tax increases* rather than a spur to added spending. (Kamenick Aff., Ex. V)[4](emphasis added).[5] For over thirty-three years, counties used the sales and use tax as a vehicle to hold down property tax *increases*, and continue to do so to this day.

2. Wisconsin County Budget Process

Wisconsin counties are statutorily required to adopt an annual budget, which, among other things, delineates all of the anticipated revenue sources that will support the budgeted expenditures. One of the revenue sources that counties rely upon to support their budgets is the local property tax levy. The property tax levy (the "Total Property Tax Levy") is expressed in dollars. The property tax rate for a county is the Total Property Tax Levy divided by the value of taxable property (i.e., Equalized Value) in the county, exclusive of any tax incremental district value increment. (Della Aff., ¶ 7).

[4] All citations to "Kamenick Aff" refer to the January 4, 2018 Affidavit of Attorney Thomas Kamenick.
[5] Plaintiffs' inclusion of various news articles from 1985 from politicians, in the course of their lobbying, is not akin to evidence of legislative intent or the Legislature's purpose behind the sales and use tax statute. (See generally Kamenick Aff, Exs O-V).

3. Wisconsin County Property Tax Levy

As a part of a county's budget process, counties levy a tax on the real property in the county as a revenue source to support the budget. Wisconsin Statute § 66.0602 imposes a limit on a county's Total Property Tax Levy ("Levy Limits"). The essence of Levy Limits is that it restricts the percentage increase in the Total Property Tax Levy to the percentage increase in the county's Net New Construction (as defined by the Department of Revenue), subject to a number of special provisions that exclude certain revenues received by the County from the Total Property Tax Levy. The most impactful exclusion relates to property taxes levied to pay debt service on general obligation debt issued on or after July 1, 2005. In other words, if a county's aggregate annual general obligation debt service payments increase year-over-year, the dollar amount of the increase can be placed on the property tax levy without limitation.[6] (Della Aff., ¶ 8).

A Wisconsin county's property tax levy can be expressed, in very simplified terms, as follows: the Total Property Tax Levy is the sum of the Operating Levy (that is generally reflective of the revenues necessary to support county government operations) and the Debt Levy (that is generally reflective of the revenues necessary to pay debt service on county borrowing). Although some small portions of the operating budget are excluded, Levy Limits restrict the percentage increase in the Operating Levy to the percentage increase in Net New Construction (*i.e.*, the amount of new construction subject to property taxes reduced by any demolition or destruction of buildings). The Debt Levy is excluded from Levy Limits. (Della Aff., ¶ 9, Ex. B).

[6] However, the total amount of general obligation debt outstanding is subject to limits set forth in Wisconsin Statute § 67.03 (i.e., shall not exceed 5% of equalized value). (Della Aff., ¶ 8).

4. Wisconsin Local Government Borrowing

Wisconsin local governments utilize a variety of instruments to issue debt to raise capital to meet their budgetary demands, all of which are identified and authorized under Chapter 67 of the Wisconsin Statutes. The authorized debt instruments include, but are not limited to: general obligation debt, utility revenue debt, and lease revenue debt. (Della Aff., ¶ 5). If a Wisconsin county issues general obligation debt, that county pledges its full faith, credit and taxing powers to support the debt and pledges that there will be levied on all of the taxable property in the county a direct, annual, irrepealable tax in an amount and at the times sufficient to pay the principal of and interest on the debt. (Della Aff., ¶ 6).

Broadly, Wisconsin counties can fund capital projects through (i) funds that have accumulated over time due to revenues exceeding expenditures (i.e., fund balance), (ii) funds appropriated from the County's Operating Levy, (iii) proceeds from the issuance of general obligation debt, (iv) other sources of revenue, including sales and use taxes.

a. Using existing fund balance materially limits the ability to finance new capital projects because in practice only a small fraction of the total fund balance would be available to spend and it would only be able to be spent once. In other words, this strategy cannot be repeated on an annual basis.

b. Because the Operating Levy is subject to Levy Limits, the ability to finance new capital projects through the Operating Levy is very limited.

c. Issuing general obligation debt to fund new capital projects, particularly projects of a material size and cost, is the most common financing method for Wisconsin counties because the incremental increase in the county's debt service (i.e., the

principal and interest payments) can be added to the Debt Levy within certain debt capacity limitations.

d. Other sources of revenue, such as a newly implemented county-wide sales and use tax, typically generate a significant amount of funds on an annual basis, which counties commonly use to either pay debt service on debt issued to fund the capital projects or to directly pay for the capital projects themselves as sales tax revenues are received. Either way, the sales and use tax reduces the county's Total Property Tax Levy by either (i) abating or eliminating the increase in debt service that would normally be included as part of the Debt Levy or (ii) eliminating the incremental debt service altogether by funding the projects directly with sales tax revenue. Both strategies are perfectly viable and prudent, but there are circumstances, which are not particularly relevant in this case, when one strategy is more appropriate than the other.

(Della Aff., ¶ 11).

B. <u>Brown County's Sales and Use Tax Ordinance</u>

In early 2017, Brown County's Board of Supervisors was considering the issuance of debt to support its capital project needs. At that time, the Board's financial advisor, Brian Della of PFM, presented a pre-sale draft presentation for the Brown County Board of Supervisors. (Della Aff., ¶ 12). That presentation described in detail Brown County's existing debt service and the total estimated debt service associated with the County's 2017 Capital Improvement Plan. (Kamenick Aff, Ex. B, pp. 56-57).

Following many informal discussions surrounding options for borrowing and other funding mechanisms, Brown County's Board of Supervisors, on May 17, 2017, enacted the Sales

and Use Tax Ordinance on a vote of 23-3 for the purpose of funding capital projects which would otherwise have been funded by additional debt obligations. (Ehlinger Aff., ¶ 5). It has been estimated that Brown County will receive approximately 30% of its sales and use tax revenues from visitors to Brown County. (Ehlinger Aff., ¶ 6). These revenues from visitors to Brown County will benefit Brown County taxpayers by lowering the property tax rate, reducing interest expenses on financing projects, and having non-County residents assist with financing through sales and use tax purchases. (Ehlinger Aff., ¶ 7).[7]

According to the Ordinance, the .5% sales and use tax is scheduled to be in effect for a period of 72 months, starting January 1, 2018. *(Id.)* The Ordinance also put strict constraints on how revenues from the sales and use tax are to be used. Section 9.02 of the Ordinance states:

> **9.02 Purpose**. This Ordinance enacts a temporary 72 month, .5 percent Brown County sales and use tax, revenues for which: 1) **Shall not be utilized** to fund any operating expenses other than lease payments associated with the below mentioned specific capital projects; and 2) **Shall be utilized** only to reduce the property tax levy by funding the below listed specific capital projects, as well as funding said specific capital projects' associated costs as deemed appropriate by Brown County administration, in the below listed estimated amounts:
>
> (1) Expo Hall Project - $15,000,000.00;
> (2) Infrastructure, Roads and Facilities Projects - $60,000,000.00;
> (3) Jail and Mental Health Projects - $20,000,000.00;
> (4) Library Project - $20,000,000.00;
> (5) Maintenance at Resch Expo Center Project - $10,000,000.00;
> (6) Medical Examiner and Public Safety Projects - $10,000,000.00;
> (7) Museum Project - $1,000,000.00;
> (8) Parks and Fairgrounds Project - $6,000,000.00; and
> (9) Stem Research Center Project - $5,000,000.00.
>
> (Complaint, Ex. B).

[7] Prior to the Board enacting the Ordinance on May 19, 2017, the public had an opportunity to address the Board. In fact, BCTA's executive committee allegedly called each Supervisor to urge them to vote "no" for the Ordinance. (Heidel Aff., ¶ 4).

Thus, the sales tax revenues (a) cannot be used to fund any operating expense other than lease expenses with these projects; and (b) had to be used to "reduce the property tax levy" by funding the delineated nine capital projects. In total, approximately $147 million in sales tax revenue is estimated to flow to Brown County over the 72 month term of the Ordinance.

The Ordinance also imposes a levy rate limit with respect to the sales and use tax. It is as follows:

> **9.04 EFFECTIVE COMMENCEMENT AND SUNSET DATES**. Subject to the following contingencies being met on or before August 15, 2017, this Ordinance shall take effect on January 1, 2018, and shall sunset 72 months thereafter, unless during said 72 month period any general obligation debt, excluding refunding bonds, is issued by Brown County in which case this Ordinance shall sunset on December 31 of the year any general obligation debt, excluding refunding bonds, is issued:
> (Complaint, Ex. B).

Thus, according to the Ordinance, two triggers would cut short the 72- month sales and use tax to December 31st in a given year:

a. The issuance of general obligation debt for anything other than a refinancing; and

b. Brown County's mill rate exceeding the 2018 Brown County Mill Rate (i.e., the total property tax rate).

(Della Aff., ¶ 20). The Ordinance provides that sales tax would begin to be collected on January 1, 2018. (Ordinance, Section 2). In 2018, sales and use tax revenues are estimated to be $22,458,333. (Kamenick Aff., Ex. D., p. 329).

The County's approach to funding its capital projects has been endorsed by an independent auditor.[8] Mr. Michael Konecny, CPA, has opined that if a county board in a situation similar to Brown County votes to enact a Sales and Use tax ordinance, that such an enactment is a fiscally responsible and appropriate decision for the following reasons:

[8] See, generally, the Affidavit of Michael Konecny filed contemporaneously herewith.

a. If a Sales and Use Tax is enacted for capital expenditures, it will decrease the amount of debt a County would otherwise have to obtain.

b. If a County decides to engage in borrowing, the annual debt service on the debt is added as an adjustment to the Allowable Levy (which is also referred to as the Total Levy) and included in the Total Property Tax Levy.

c. Since Sales and Use Tax revenue provides funding for capital expenditures, it replaces the need for the County to issue debt and include additional debt service in the Total Property Tax Levy.

d. Thus, a Sales and Use Tax Ordinance goes to directly reducing the Total Property Tax Levy because it allows a County to avoid borrowing, which in turn avoids increasing the debt levy.

(Konecny Aff., ¶ 8).

Mr. Konecny's opinion is consistent with the calculations contained in Brown County's Levy Limit Worksheet[9] and Brown County's position that these revenues from visitors to Brown County will benefit Brown County taxpayers by lowering the property tax rate, reducing interest expenses on financing projects, and having non-County residents assist with financing through their purchases.

(Ehlinger Aff., ¶ 7).

C. Brown County's Budget And Audit Process

2017 was a very active year for the County's budget process. That process began in January 2017 and included a seven month strategic planning process, a three month capital

[9] Brown County's levy limit worksheet is based off of DOR Form SL-202C. https://ww2.revenue.wi.gov/Internet/forms/govtvc/sl-202c.pdf

improvement program, and an eight month budget process with final budget adoption occurring in November 2017. (Kamenick Aff., Ex. C; Ehlinger Aff., ¶ 11).

The Ordinance was a critical part of the process. As set forth in Brown County's annual budget, the budgeting process begins in January of the preceding year. (Kamenick Aff., Ex. C) Brown County's Finance Department is responsible for implementing and completing the annual budgeting process, as well as verifying adherence to statutory levy limits. (Ehlinger Aff., ¶ 9). Prior to enacting the 2018 budget, as indicated above, Brown County engaged in a lengthy, overlapping multi-step, budgeting process. That process included but is not limited to the following:

a. Working with Information Technology, Human Resources, and insurance brokers to ensure all county health, dental, workers compensation, and unemployment compensation plans are appropriately funded;
b. Working with the County's liability brokers and consultants to ensure all insurance coverages are in place; and
c. Working with all departments on their proposed capital projects and budgets.

(Ehlinger Aff., ¶ 10).

From early-2017 through mid-2017, Brown County's Finance Department collected budget information from 31 different Brown County departments and programs. In total, budgetary activity is tracked through 77 different funds for the 2018 budget. (Ehlinger Aff., ¶ 12).

The Finance Department then compiled this information and estimated the amount of allowed budgetary levy increase due to net new construction in August 2017. (Ehlinger Aff., ¶ 13). The Finance Department then prepared a draft budget and submitted it to the County

Executive. (Ehlinger Aff., ¶ 14). The Annual Budget was approved in November 2017. (Complaint, ¶ 17).

D. <u>The County Audit Process</u>

All counties in Wisconsin are required to have an annual financial audit in accordance with Wis. Stat. § 66.0605, which are conducted pursuant to the Government Auditing Standards. (Konecny Aff., ¶ 9). Generally accepted government auditing standards ("GAGAS") establish requirements for performing financial audits that are in addition to the requirements set forth by the American Institute of Certified Public Accountants. The additional requirements include certain items relating to auditor communication, completing tests regarding internal control and noncompliance with provisions of laws, regulations, contracts, and grant agreements and reporting audit results. (Konecny Aff., ¶ 10).

While all audits require an auditor to consider an entity's compliance with applicable laws and regulations, GAGAS requires the auditor for Wisconsin counties to issue a separate report on internal control and compliance with provisions of laws, regulations, contracts and grant agreements. (Konecny Aff., ¶ 11). This separate report is signed by the audit firm and states that the audit firm "performed tests of the County's compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts." Based on the results of the tests, the separate report will contain language for one of two scenarios similar to the following:

- **If no instances of noncompliance:** The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under Government Auditing Standards.
- **If instances of noncompliance disclosed:** The results of our tests disclosed the following instances of noncompliance that are required to be reported under Government Auditing Standards.

> *Each instance of noncompliance will then be described in detail, normally with a summary of any impact and/or a recommendation for further action.*

(Konecny Aff., ¶ 12).

Despite arguing that levy limits are intended to prevent Brown County's use of the sales and use tax in situations such as this, Plaintiffs have not pointed to a single Wisconsin decision, standard, rule or order that has expressly prohibited sales and use taxes being used as a vehicle to fund new capital projects after the levy limits were enacted in 2006. Plaintiffs spend a significant portion of their brief discussing levy limits. Simply put, the levy limits have no direct relationship to sales and use tax revenues. Plaintiffs' argument that the 2006 enactment of levy limits now precludes a county from raising a property tax levy "however much it wants to pay for new expenditures" is a red herring and has no bearing on how Brown County has chosen to spend its sales and use tax revenues.

In bringing this lawsuit, Plaintiffs conveniently ignore the nature of a County budget and mix in unrelated financial concepts to create their argument. Plaintiffs also ignore the fact that adoption of their theory will have a devastating negative financial impact on Brown County and its property owners. Taking Plaintiffs' theory to its logical conclusion, all capital projects in Brown County will be completely suspended and the only way they could ever be funded is through borrowing or bonding. Should Brown County be forced to issue general obligation debt, through borrowing or bonding, the sales and use tax would sunset under Section 9.04 of the Ordinance and Brown County taxpayers would receive a bill for over $40 million in interest costs.

STANDARDS FOR A TEMPORARY INJUNCTION

For more than 100 years, Wisconsin courts have understood an injunction to be an "extraordinary remedy." *See Wolf River Lumber Co. v. Pelican Boom Co.*, 83 Wis. 426, 53 N.W. 678 (1892); *McKinnon v. Benedict*, 38 Wis. 2d 607, 157 N.W.2d 665 (1968). Injunctions are not to be issued lightly. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 24, 301 Wis. 2d 266, 732 N.W.2d 828; *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974). Rather, the cause must be substantial. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519–20, 259 N.W.2d 310 (1977). The general rule is that, "[i]njunctions do not issue for inconsequential or trivial causes." *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966) (quoting *Milwaukee Elec. Ry. & Light Co. v. Pallange*, 205 Wis. 126, 134, 236 N.W. 549 (1931)).

Under a four prong test, a temporary injunction is not to be issued unless the movants demonstrate there is a (1) a likelihood of irreparable injury if the injunction is not granted; (2) no adequate remedy at law exists; (3) that an injunction would be necessary to preserve the status quo; and (4) and there is a reasonable probability of success on the merits. *Werner*, 80 Wis. 2d at 520; *see also Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Prod., Inc.*, 545 F.2d 1096, 1097 (7th Cir. 1976) ("A preliminary injunction is an extraordinary remedy which *is not available unless the plaintiffs carry their burden of persuasion as to all of the prerequisites")(*emphasis added).

Importantly, the purpose of "a temporary injunction 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." School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) (emphasis in original).

Plaintiffs cannot meet their burden on any one of these elements, much less all four. Their motion for injunctive relief should be denied.

ARGUMENT

A. Plaintiffs Cannot Meet the Four-Part Test For a Temporary Injunction

1. Plaintiffs Cannot Establish They Will Be Irreparably Harmed Because Monetary Damages Do Not Constitute Irreparable Harm

Pursuant to the first of the four pronged *Werner* test, Plaintiffs must demonstrate that they will be irreparably harmed if they do not obtain a temporary injunction. The analysis of this prong depends on the facts and circumstances of each case. *Joint School Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n,* 70 Wis. 2d 292, 234 N.W.2d 289 (1975). Tellingly, Plaintiffs argue they have "no practical" remedy. (Pl. Br., p. 4). While Plaintiffs admit they can request a sales tax refund from the DOR or from the vendor, they say "that process is lengthy, requires filling out forms . . . and requires the cooperation of the vendor." (*Id.*).[10] The Wisconsin Legislature has explicitly provided statutory mechanisms for "refund determinations." (Pl. Br., p. 4) Wis. Stat. § 77.59(4)(a) and Wis. Stat. § 77.59(9p)(b) both contain specific mechanisms in place for a taxpayer to obtain sales and use tax refunds.

In fact, in *Dairyland Harvestore v. DOR,* the Court of Appeals addressed the specific issue of excess sales tax returns and claims for refund. 151 Wis. 2d 799, 447 N.W.2d 56 (Ct. App., 1989). The Court of Appeals, in affirming the circuit court's decision that the appellants are not entitled to an offset because they had a right to file refund claims, recognized that Wis. § 77.54(4) was a challenge but declined to allow the taxpayers their easier remedy of an offset. Most importantly, it stated "*We decline to create an equitable remedy to allow offsets,* and we

[10] Plaintiffs also complain that they will suffer "lost time and travel expenses" if they have to drive outside of Brown County for purchases to avoid the sales and use tax. By their own brief, this is speculative at best and should not be considered in determining whether Plaintiffs will suffer irreparable harm.

conclude that the doctrine of equitable recoupment is inapplicable." 151 Wis. 2d at 799 (emphasis added). *Dairyland* also stated:

> We recognize that sec. 77.59(4), Stats., can cause administrative difficulties. Refund claims may be filed by both the customer who paid the tax to the retailer and by the retailer who paid it to the department, ***but presumably the legislature was aware of this problem.***

151 Wis. 2d at 810 (emphasis added).

As the Wisconsin Department of Revenue ("DOR") correctly states, the loss of money is not an irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974)(holding "Mere 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.") *Id*. at 90. Under *Sampson*, *Joint School Dist. No. 1*, and the facts and circumstances of this case here, Plaintiffs' argument fails because their only damage is money and by their own admission, they have other statutory means in which they could be compensated if this Court ultimately rules in their favor at the conclusion of this case. (Pl. Br., p. 4).

In fact, it is the County not the Plaintiffs, who will be harmed if a temporary injunction is granted. As the DOR states in its brief in opposition to Plaintiff's motion, if the temporary injunction is granted but Brown County ultimately prevails, Brown County will have *no way to retroactively collect the sales and use tax for the period for which it was enjoined*. (DOR's Br. In Opp., p. 12). Brown County will essentially be unable to retroactively collect taxes. But the harm to Brown County is much greater than being unable to retroactively collect sales and use taxes.

Since the sales and use tax ordinance has a trigger that sunsets the sales tax before 72 months in the event general obligation debt is issued to fund new projects, the County would be caught "in limbo" if a temporary injunction prohibiting collection of the sales tax is issued. (Della Aff., ¶ 21). Should Brown County be required to issue general obligation debt (even if it is temporary in nature), the Sales and Use Tax would sunset earlier than planned. (Della Aff., ¶ 23).

The Legislature put in place mechanisms consumers can follow to apply for refunds for excess sales and use tax. Once again, the Plaintiffs are using the judicial system as a means to effectuate legislative changes. Under *Sampson* and *Dairyland Harvestore*, Plaintiffs cannot establish they will be irreparably harmed in light of Wis. Stat. § 77.59(4)'s refund mechanisms.

2. <u>Plaintiffs Have Other Adequate Remedies At Law</u>

Similarly under *Joint School District*, Plaintiffs' argument that they meet the second prong because they have no "other adequate remedy at law" is intertwined with "irreparable harm". For the reasons discussed in this brief, an injunction will be disastrous to the County and will result in additional interest owed by the Brown County taxpayers of approximately $47 million. (Della Aff., Ex. H). That is the actual remedy that Plaintiffs are requesting here.

As stated above in Section 1, Plaintiffs have other adequate statutory remedies at law. Under Wis. Stat. §§ 77.59(4)(a) and (9p)(b), Plaintiffs have an explicit process which they should follow.

By keeping track of their receipts, Plaintiffs would be able to obtain any refunds if the sales and use tax is ultimately found to be invalid. This approach would not be unduly burdensome or unreasonable to Plaintiffs, and particularly when considering that alternate result would be damages in the amount of $147 million to Brown County if this sales and use tax is

enjoined. As DOR stated, the refund process is not lengthy and it can "waive the requirement that the vendor also sign the refund form." (DOR Br. In Opp., p. 11). The record here demonstrates that there are other adequate remedies at law which are not burdensome. Thus, Plaintiffs cannot satisfy the element of "inadequate remedy."

3. Plaintiffs Incorrectly Argue A Temporary Injunction Is Necessary to Preserve The Status Quo Because An Injunction Would Change the Status Quo

A. The Status Quo Will Change

The third prong requires courts "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 requested." *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 127 N.W.2d 29 (1964)(emphasis added). Plaintiffs cannot meet this third prong because the status quo of the parties will change if Plaintiffs are granted a temporary injunction.[11] The status quo is that the sales and use tax is being collected.[12]

Plaintiffs are incorrect that it will take several months for Brown County to obtain the first revenues. Per Wis. Stat. § 77.76(3), payment of sales and use tax revenues is due "no later than 75 days following the last day of the calendar quarter in which such amounts are reported." In this case, Brown County will receive funds sooner than mid-April 2017. Brown County has already received its first report and payment from DOR on sales and use tax revenues for January 2018. (Ehlinger Aff., ¶ 23). Brown County will receive its second report and payment from DOR on sales and use tax revenues on the last day of February 2018, and on the last day of the

[11] Had Plaintiffs filed this action prior to January 1, 2018, the effective date of the Ordinance, they may have been able to meet this prong. But due to their untimely action, they cannot now meet this prong. Nor should Plaintiffs be able to "unring" this bell by arguing that because they may have been able to meet this third prong in 2017, they should still meet it now. Plaintiffs' delay in bringing this action is no one's fault but their own.

[12] DOR started the process of establishing the sales and use tax in October 2017 by notifying Brown County sellers so that they would have the opportunity to change their systems to collect the tax. (Abrams Aff., ¶¶ 18-19).

month thereafter until the tax sunsets. (Ehlinger Aff., ¶ 24). Thus, contrary to Plaintiffs' argument, Brown County is already receiving revenues from sales and use tax proceeds.

Under *Codept*, the current status quo is that the tax is being collected and projects are moving forward. Plaintiffs argue that "the only hardship here is that Brown County may have to delay starting the new projects it had planned on funding with the sales tax revenues, or finding a new funding source for them." (Pl. Br., p. 6). Such an argument is not only short-sighted but is plain wrong. The "hardship" is simply not a delay but rather that an injunction will result in Brown County having to borrow for these already budgeted, contracted, and commenced projects. There is a certain, negative, irreversible ripple effect which Plaintiffs ignore.

Under the Ordinance, if Brown County is enjoined, Brown County will be negatively impacted because should it be required to issue bonds, it would likely have to amend its 2018 Budget to reflect the first interest payment due on the 2018 bond issue. (Della Aff., ¶ 23). If Brown County issues bonds, the sales and use tax will automatically sunset on December 31 of that fiscal year. (Ordinance, Section 9.04).

B. Brown County's Budget Would Need To Be Amended

If the sales and use tax is enjoined, Brown County's Annual budget would need to be amended. However, Brown County has no ability to amend its property tax levy for 2018. (Ehlinger Aff., ¶ 25). Plaintiffs chose to wait to bring this suit. Brown County's budget is set, the property tax levy is set, and the 2018 Budget has been in effect for two months. (Ehlinger Aff., ¶ 28).

An injunction would severely impact the entire county budgeting process. Brown County would also have to reengage in months of strategic planning, analysis, and budgeting to put into effect an amended budget for 2018, while concurrently working on a 2019 budget, and preparing

financials for calendar year 2017. (Ehlinger Aff., ¶ 29). Such an impact on Brown County would be unduly burdensome and prejudicial because Brown County would have to modify its cash flow statements, potentially engage in debt service, and reprioritize capital projects while working on the 2019 Annual Budget and 2017 financial reports. (Ehlinger Aff., ¶ 30)

C. Brown County's Credit Rating Could Be Affected

Brown County's credit rating could also be affected. As further described by Mr Della, Brown County maintains credit rating on its general obligation debt from Moody's Investors Service, a global credit rating, research, and risk analysis corporation. Moody's currently rates Brown County "Aaa", its highest rating possible. (Della Aff., ¶ 24, Ex. J).

Per Moody's Credit Opinion, credit strengths for Brown County are:

a. A large tax base serving as a regional economic hub anchored by Green Bay;
b. Strong financial operations supported by healthy reserves; and
c. A "**recently passed sales %.5 sales tax**."

(Della Aff., ¶ 26).

Per Moody's Credit Opinion, credit challenges are (a) a modest socioeconomic profile for rating category and (b) limited revenue raising flexibility given state imposed levy restrictions. (Della Aff., ¶ 27). Per Moody's Credit Opinion, factors that could lead to a downgrade for Brown County's credit rating are:

a. Weakening of the county's tax base and/or demographic profile;
b. Deterioration of the county's reserves and/or liquidity; and
c. **Growth in the county's debt or pension burden**.

(Della Aff., ¶ 28).

Thus, if Brown County is required to borrow the estimated $146.6 million necessary for the capital projects, which it otherwise would have obtained through sales and use tax revenue, and to incur an associated estimated $40 million in interest charges, then Brown County's credit

rating will most likely be adversely impacted because it loses a credit strength and gains a downgrade factor if the County is unable to use sales and use tax revenues to satisfy its capital obligations. (Della Aff., ¶ 29; Ehlinger Aff., ¶ 31).

Furthermore, an estimated $70 million dollars in debt reduction that would otherwise be realized under the sales and use tax plan would be lost. (Ehlinger Aff., ¶ 26). In addition, the County, by using sales tax revenue to pay debt service, is required by law to reduce the general levy by the amount of debt service retired each year, but if the sales tax is enjoined, then that significant reduction in the general levy will not be realized. (Ehlinger Aff., ¶ 27).

One such effect could be a downgrade from its "Aaa" credit rating. (Della Aff., ¶ 29). Should Moody's downgrade Brown County's "Aaa" credit rating, Brown County would have to pay higher interest rates on its debt than if it had maintained its current "Aaa" rating. This increase in rates generates higher interest payments, which will ultimately be placed on the Debt Levy and included into the Total Property Tax Levy, for the taxpayers of Brown County to pay. (Della Aff., ¶ 30).

Incredibly, Plaintiffs suggest that capital projects such as the roads we drive on, the mental health facilities taking care of some of society's most vulnerable citizens, the jails that protect the public, and other infrastructure projects are "not fundamental expenditures necessary to the ordinary and orderly operation of the County" but are "luxuries, not necessities." (Pl. Br., p. 6). Plaintiffs argue that the County can simply tell contracting parties that it was enjoined to be able to avoid a breach of contract claim. Plaintiffs' misguided and disturbingly simplified argument ignores the fundamental promises Brown County has already made in these capital project contracts as well as the role of government to ensure basic infrastructure and resources for the safe and orderly operations of its community and for the benefit of its citizens.

D. DOR Cannot Feasibly Hold Funds In Trust

Plaintiffs also request, in the alternative, that the Court order DOR to hold funds in trust if the sales and use tax is not enjoined. However, for the same reasons as above, requiring DOR to hold these funds in trust would have the same damage to Brown County and is not feasible As DOR's brief in opposition states, "Plaintiffs 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 win." (DOR Br. In Opp., p. 15). DOR also points out that it pays Brown County out of state general revenue program revenue funds and the most it can do is "track and maintain records . . . and withhold the payment from Brown County" and if ordered to do so, it will not know what it should do with the withheld money should Plaintiffs' ultimately win. *Id*. Overall, Plaintiffs' demand that DOR hold the funds in trust creates more problems than results, is not feasible, and will impact Brown County in the same manner as if the sales and use tax is enjoined.

Assuming an injunction is granted and Brown County does not receive sales and use tax revenues for at least 6-9 months (a conservative estimate for any litigation to conclude), that time period alone would require Brown County to issue general obligation debt, which again, would trigger the Ordinance's sunset clause, cause Brown County's budget to be out of balance in violation of law, and would very likely decrease Brown County's bond rating with Moody's. (See generally Della Aff).

4. Plaintiffs Have a Slim Probability of Success on the Merits

Putting aside Plaintiffs' utter disregard for the notice of claim statute, Plaintiffs have a slim probability of success on the merits and cannot meet the fourth prong of Wis. Stat. § 813.02. See also *Shearer v. Congdon,* 25 Wis. 2d 663, 131 N.W.2d 377 (1964).

A. Wis. Stat. § 77.70 Is Unambiguous And Does Not Require a Dollar-For-Dollar Reduction

Under long-established Wisconsin law, "if the meaning of the statute is clear and unambiguous on its face, it is improper to employ extrinsic aids as to determine the meaning intended." *Standard Theatres v. Transportation Dept.,* 118 Wis. 2d 730, 740, 349 N.W.2d 661 (1984): *Wis. Elec. Power Co. v. Public Service Comm.*, 110 Wis. 2d 530, 534, 329 N.W.2d 178 (1983).

Wis. Stat. 77.70 is unambiguous and does not require a dollar-for-dollar reduction, as the Plaintiffs contend. Per the statute's plain language, the sales and use tax may be imposed "for the purpose of directly reducing the property tax levy and only in their entirety." As evidenced by Mr. Della's and Mr. Konecny's affidavits, that is the direct result of Brown County's property tax levy. Thus, there is no reason to look to extrinsic evidence to determine the intent behind Wis. Stat. § 77.70.

Plaintiffs' argument of "directly reducing tax levy" is incorrect and logically flawed for multiple reasons. First, Wis. Stat. § 77.70 was enacted in 1985 through 1985 Wis. Act 41. Plaintiffs correctly point out that, prior to § 77.70's enactment, then Senator Russ Feingold sought to amend the draft bill language to include the phrase "directly reducing the property tax levy" into the statute. Satisfied with that inclusion, Governor Tony Earl signed the bill into law and said it was meant to be "a vehicle to hold down property tax increases rather than a spur to added spending." (Kamenick Aff., Ex. V). Thus, even as early as 1985, the government (and the public) knew that sales and use tax was to be used to hold down "property tax increases"- not to exclusively pay *down* current property taxes, as Plaintiffs now argue.

Mr. Konecny has personally observed how counties have used sales and use tax revenues and he has not observed those revenues being used to be a dollar-for-dollar offset against

property tax levies. (Konecny Aff, ¶ 14). His opinion is supported by Brown County's debt levy limit worksheet which does not contain a single line item under the "Determination of Allowable Levy" or "Adjustment to Levy Limit" to account for this alleged dollar-for-dollar offset against the property tax levy. (Kamenick Aff., Ex. F). If DOR intended to have sales and use tax revenues used to offset the property tax levy, it certainly would have included it in the Levy Limit Worksheet.[13]

B. County Auditing Processes Do Not Require A Dollar-For-Dollar Reduction to the Total Property Tax Levy From Sales and Use Tax Revenues

In addition, for the past 25 years, Mr. Konecny personally reviewed annual financial audits, including the reports on internal control and compliance of at least 25 counties that have sales and use tax. None of the reports contained a disclosure of noncompliance with Wisconsin Statutes for anything related to sales and use tax. (Konecny Aff, ¶ 15). Thus, the sales and use tax has effectively operated "for the purpose of directly reducing the tax levy." Plaintiffs' attempt to interchange "directly" with "exclusively" (Pl. Br., p. 8) effectively reads language into the statute when no such language exists.

In 2006, the Legislature adopted levy limits for counties – counties were significantly constrained in the amount of property tax they were authorized to levy. Plaintiffs argue that levy limits "sharply prohibit how much counties may raise their property taxes, sharply limiting what a county can spend on new projects with a property tax increase, or by the Attorney General's logic, with a sales and use tax." (Pl. Br., p. 12). However, Plaintiff's argument that Brown County is using the sales and use tax to avoid levy limits is a red herring. Plaintiffs improperly

[13] The County anticipates that DOR will agree with the County's position given that DOR's consistent 12 year interpretation of the sales and use tax as it is applied.

mix sales and use tax and property tax together. They argue that sales and use tax cannot be used for projects in excess of levy limit.

Plaintiffs' "simple" syllogism is flawed. According to Plaintiffs, there should be a dollar-for-dollar reduction in the Total Property Tax Levy in a given year by the estimated amount of sales tax receipts in that year. In very round numbers, the Plaintiffs seem to be arguing that the County's approximately $90 million Total Property Tax Levy should be reduced in subsequent years by the estimated amount of sales taxes to be received in that year, roughly $25 million for a full 12 months of collection. (Della Aff., ¶ 32).

The above dollar-for-dollar reduction argument would seem to only apply to a scenario where the county implementing a sales and use tax did so with no other significant changes to its annual budget. However, Brown County has anticipated funding an additional $18 million of capital projects during 2018 utilizing $18 million of sales tax revenues. Projections for project funding and sales tax receipts in future years have in aggregate a similar one-to-one ratio (i.e., the County's budgeted capital expenditures increase by the estimated amount of sales tax receipts). (Della Aff., ¶ 33).

The application of the sales and use tax reduces Brown County's Total Property Tax Levy by eliminating the incremental debt service that would otherwise be associated with the issuance of general obligation debt needed to fund the $147 million of projects identified in the Sales and Use Tax Ordinance. (Della Aff., ¶ 34).

As discussed above, the only alternative to sales and use tax is the County's issuance of general obligation debt. For all debt, there are debt-servicing charges, otherwise known as interest. The County will pay interest on these bonds to their investors. Plaintiffs' argument that the County should borrow funds for all of its capital projects also ignores the interest the County

would have to pay on those bonds and is contrary to the best interests of the County and its taxpayers.

In fact, a sales and use tax will have the opposite effect. It will not only avoid the estimated $40 million in interest payments associated with a $147 million general obligation debt, but it will also receive an estimated 30% of its revenues from visitors to Brown County. (Ehlinger Aff., ¶ 6). Thus, a sales tax is not only a wise and responsible long term investment strategy but it will also decrease the costs that Brown County taxpayers will have to pay for these capital projects. (Ehlinger Aff., ¶ ¶ 7-8).

C. Brown County Could Not Have Engaged In the Borrowing Process to Simply Enact the Sales and Use Tax Ordinance.

Plaintiffs argue that Brown County should have gone through the borrowing process so that it could simply argue now to the Court (even though Plaintiffs sat silent as budgeting occurred for months in 2017) that the sales and use tax was going to "directly reduce the property tax"

Before any debt service can be approved, the County must first issue a detailed Official Statement on the proposed debt, which includes the purpose of the bonding. (Ehlinger Aff., ¶ 18, Ex. A). There is no logical reason why a county would issue Official Statements, pass resolutions, and incorporate debt service into a proposed annual budget, when there are no actual plans by a county to issue the debt, and for the sole purpose of implementing a sales and use tax ordinance. (Ehlinger Aff., ¶ 19). Such a frivolous exercise would incur fees from bond counsel, financial advisors, rating agencies, and trust agencies. In addition, such an exercise could result in a negative credit rating, is a waste of taxpayer resources, would skew a county's budget, and drive away potential lenders. (Ehlinger Aff., ¶ 20).

Under their logic, Brown County should spend countless hours and resources to go through budgeting for no valid purpose because the sales and use tax revenues should be used to "exclusively" pay down the property tax levy. That is an absurd and incorrect interpretation of a statute which also puts words into the statute which do not exist. *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 310 Wis. 2d 456, 471, 750 N.W.2d 900 (2008)("We will not insert the word "correct" or "lawful" into this plainly worded and easily understood statute"); see also *State-Dep't of Corr. v. Schwarz*, 279 Wis. 2d 223, 235, 693 N.W.2d 703 (Ct. App., 1989)(holding "By adding the word "current" into its interpretation of § 304.072(3), the court of appeals attempted to make an ambiguous provision unambiguous. We will not "read into the statute language that the legislature did not put in."); *Fond du Lac County v. Town of Rosendale,* 149 Wis.2d 326, 334, 440 N.W.2d 818 (Ct.App.1989)("One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning.")

B. <u>If A Temporary Injunction is Granted, The Court Should Order a Bond Be Posted For $147 Million Pursuant To Wis. Stat. § 813.06.</u>

Finally, Plaintiffs seek a temporary injunction under Wis. Stat. § 813.02. Under Wis. Stat.§ 813.06, the Court should order Plaintiffs to post a security for damages if Brown County is enjoined or if the sales and use tax funds are held in trust by DOR. Wis. Stat. § 813.06 states:

> In proceedings under s. 767.225 the court or judge may, and in all other proceedings except proceedings under ss. 813.12, 813.122, 813.125 and 823.113 the court or judge <u>shall</u>, require a bond of the party seeking an injunction, with sureties, to the effect that he or she will pay to the party enjoined such damages, not exceeding an amount to be specified, as he or she may sustain by reason of the injunction if the court finally decides that the party was not entitled thereto. Copies of such bond, affidavit or other pleading shall be served upon the party enjoined and the officer serving the same shall, within 8 days after such service, file his or her return in the office of the clerk of the court.

(emphasis added).

With exceptions not present here, Wis. Stat. § 813.06 mandates that the court "shall" require a party seeking an injunction to post a bond. The Wisconsin Supreme Court has made clear that under the predecessor to Wis. Stat. § 813.06,[14] "the court must require a bond from a party seeking an injunction." *Becker v. Becker*, 66 Wis. 2d 731, 735–36, 225 N.W.2d 884 (1975). In *Becker*, the Supreme Court directed the trial court on remand to "fix the amount of bond to be required from the plaintiff, if the injunction is to be continued." *Id.* at 736. In fact, Brown County courts have historically required a movant to post a bond when seeking a preliminary injunction. In a 1991 decision and order, Wisconsin's Eastern District Court noted that the Brown County Court required the Village of Pulaski to provide a bond in connection with a preliminary injunction pursuant to Wis. Stat. § 813.06. *Kohlbeck v. Village of Pulaski*, 759 F. Supp. 490, 492 (E.D. Wis. 1991).[15]

If this Court grants Plaintiffs' motion, then Plaintiffs should post a bond for the amount of damages Brown County would sustain if the Court finally decides the Plaintiffs were not entitled to the damages sought. As stated above, a temporary injunction would have the effect of requiring Brown County to issue general obligation debt, which would then trigger the sunset of the sales and use tax. If this occurs, Brown County would lose all of the estimated $147 million that it otherwise would have obtained from the sales and use tax revenues in the coming 72 months, because the Ordinance would sunset. Thus, if Plaintiffs' motion is granted, this Court should order Plaintiffs post a bond for $147 million.

[14] Wisconsin Stat. § 268.06 (1973–74) later became Wis. Stat. § 813.06. *See* Sup. Ct. Order, 67 Wis. 2d 585, 760 (1975).

[15] Coincidentally, the enjoined party, Kohlbeck filed a Notice of Claim with the Village of Pulaski after the injunction alleging "losses, damages, and expenses." Thus, even after the Village moved to enjoin the Kohlbecks, and aware that the Kohlbecks disagreed with them, the Kohlbecks nevertheless attempted to comply with the Notice of Claim provisions. *Id*. at 492.

CONCLUSION

As evidenced in their arguments, Plaintiffs' real concern is with the manner in which Brown County implemented its sales and use tax and its use of the sales and use tax revenues. Plaintiffs' dispute is a legislative dispute, not a judicial one. If the Plaintiffs disagree with decisions made by the Brown County Board of Supervisors on how lawfully collected sales and use tax revenues are spent, they have the ability (and certainly the right) to elect different members to the Brown County Board of Supervisors. Instead of using the proper channels, the Plaintiffs are essentially seeking to hold Brown County captive by asking the Brown County Court to enjoin the Brown County Board of Supervisors decision on the enactment and implementation of the sales and use tax. Despite courts being unwilling to legislate from the bench, that is exactly what the Plaintiffs are asking this Court to do.

For the reasons set forth above, Plaintiffs fail to meet any of the four necessary elements for a temporary injunction and therefore, their motion for a temporary injunction must be denied.

Dated at Milwaukee, Wisconsin, this 9th day of February, 2018.

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