

BROWN COUNTY
TAXPAYERS ASSOCIATION
and FRANK BENNETT,

Plaintiffs,

v.

Case No. 18-CV-0013

BROWN COUNTY and
RICHARD CHANDLER,

Defendants.

**DEFENDANT RICHARD CHANDLER'S RESPONSE TO
DEFENDANT BROWN COUNTY'S MOTION TO DISMISS**

Defendant Richard Chandler, Secretary of the Wisconsin Department of Revenue (the "Department") takes no position on the merits of Brown County's motion to dismiss the plaintiffs' complaint. However, if Brown County is dismissed from this lawsuit, the entire action should be dismissed for failure to join an indispensable party, and the Department will move for dismissal at that time. Wis. Stat. §§ 803.03(1), (3), 802.06(8)(b).

Whether an action should be dismissed under this statute requires a two-part inquiry. First, a court must decide if a party is "necessary" for one of the three reasons under Wis. Stat. § 803.03(1). *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 9, 258 Wis. 2d 210, 655 N.W.2d 474.

One stated reason is “[t]he person claims an interest relating to the subject of the action and is so situated that the disposition of the action may . . . [a]s a practical matter impair or impede the person’s ability to protect that interest.” Wis. Stat. § 803.03(1)(b)1.

If the party is found necessary, the court’s second inquiry is whether “in equity and good conscience,” the action should not proceed in that party’s absence. Wis. Stat. § 803.03(3); *Dairyland Greyhound Park*, 258 Wis. 2d 210, ¶ 9. The statute lists four factors a court weighs in deciding whether the action should proceed, including “[t]o what extent a judgment rendered in the person’s absence might be prejudicial to the person or those already parties.” Wis. Stat. § 803.03(3)(a).

Under this test, the action should be dismissed in Brown County’s absence. Brown County is a necessary party because it enacted the sales and use tax the plaintiffs are challenging in this case. (Compl. ¶ 6.) Brown County claims an interest relating to the central subject of the action (the legality of its tax), and is so situated that disposition of this matter in its absence will impede its ability to protect that interest. Wis. Stat. § 803.03(1)(b)1.

Brown County is the only defendant with a direct and substantial stake in the outcome of this case because it was responsible for enacting the tax, and will therefore defend its legality. In addition, Brown County, not the Department, would receive the revenue of the sales and use tax to fund the

capital projects listed in the ordinance. Brown County stands to lose that revenue if an adverse judgment is entered in its absence.

The Department is not in a similar position in this lawsuit. The Department is a defendant in this action only because it is responsible for levying, enforcing, and collecting county sales and use taxes under Wis. Stat. § 77.76(1). (Compl. ¶ 7.) The Department takes no position on whether Brown County's tax complies with state law, the central legal issue in this case. Thus, disposition of this action in Brown County's absence will impair its ability to protect its interest. Wis. Stat. § 803.03(1)(b)2.

“[I]n equity and good conscience,” the action should not proceed in Brown County's absence. Wis. Stat. § 803.03(3). Without Brown County as a defendant, there will be no party to defend the legality of the tax, and Brown County will be prejudiced if this Court renders a judgment in its absence. Wis. Stat. § 803.03(3)(a). This prejudice outweighs the other factors described in Wis. Stat. § 803.03(3), as the Department will further explain in its motion to dismiss, should a motion be necessary.

For these reasons, if this Court dismisses the complaint as to Brown County, the entire action should be dismissed for failure to join an indispensable party, and the Department will move for dismissal at that time.

Dated this 2nd day of February, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Response to Defendant Brown County's Motion to Dismiss with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 2nd day of February, 2018.

/s/ Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE