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CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

| STATE OF WISCONSIN | CIRCUIT COURT BRANCH 10 | DANE COUNTY |
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| RISE, INC. and JASON RIVERA, Plaintiffs, v. WISCONSIN ELECTIONS COMMISSION and MARIBETH WITZEL-BEHL, Defendants, MICHAEL WHITE and EVA WHITE, Proposed Intervenor Defendants. | | Case No. 2022-CV-002446 Case Code: 30701 Declaratory Judgment |

**[PROPOSED] INTERVENOR DEFENDANTS' MEMORANDUM IN SUPPORT OF
[PROPOSED] MOTION TO DISMISS**

INTRODUCTION

Yesterday, Michael and Eva White moved to transfer this case to the Waukesha County Circuit Court. They believe that transferring the case is the correct and efficient route. In the alternative, however, the Whites move to dismiss the complaint because it fails to state a claim, and out of deference to the Waukesha County Circuit Court's judgment. At the very least, the Court should dismiss Maribeth Witzel-Behl as an improper party and transfer the remaining claims to the Waukesha County Circuit Court.

BACKGROUND

Plaintiffs Rise, Inc. and Jason Rivera filed this case on September 27, 2022. They seek declaratory and injunctive relief against the Wisconsin Elections Commission (WEC) and Maribeth Witzel-Behl in her official capacity as city clerk for the City of Madison. Plaintiffs claim

that Wisconsin's election system "has been thrust suddenly into a state of disarray." Doc. 1 at 4. The source of that disarray, Plaintiffs say, is the injunction that the Whites obtained against WEC in *White v. Wisconsin Elections Commission*, 2022-CV-001008 (Wis. Cir. Ct. Sept. 7, 2022).

The Whites filed their lawsuit to prevent WEC from issuing unlawful guidance regarding absentee ballot witness certifications. Before the Waukesha County Circuit Court's injunction, WEC provided guidance to election officials instructing them to "rehabilitat[e] an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address." *White*, 2022-CV-001008, Doc. 12, Ex. D (Aug. 2, 2022) (quoting now-removed guidance on WEC's website). Officials were encouraged to consult outside sources to remedy an absentee-ballot witnesses' incomplete address. *Id.* But Wisconsin law already provides a process for how to handle defective witness certifications: "the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under [Wis. Stat. § 6.87(6)]." Wis. Stat. § 6.87(9).

The Waukesha County Circuit Court took considerable briefing on the issues and held multiple hearings. After finding that WEC's guidance was contrary to law, the court temporarily—and then permanently—enjoined WEC from unilaterally correcting defective witness certifications. WEC published guidance on its website in accordance with the injunction. *See Temp. Inj. on WEC Guidance re Missing Absentee Witness Address (White v. WEC, 22-CV-1008)*, WEC (Sept. 14, 2022), <https://bit.ly/3y4Prm0>.

Plaintiffs complain that the Waukesha County Circuit Court's injunction "leav[es] local election officials without clear directives on whether certain absentee ballots can be counted." Doc. 1 at 4. They claim that the injunction will result in confusion and "systematic disenfranchisement

of absentee voters around the state.” Doc. 1 at 8. Plaintiffs aim to convince this Court that “address” is ambiguous and must be construed to mean “only the information necessary to reasonably discern the location where the witness may be communicated with.” Doc. 1 at 8-9. They request declaratory and injunctive relief to that effect, claiming their “requested relief would restore the functional result of the 2016 guidance.” Doc. 1 at 9.

LEGAL STANDARD

A defendant may move to dismiss a complaint for lack of subject matter jurisdiction, failure to state a claim, failure to join an indispensable party, and because another action is pending between the same parties for the same cause. Wis. Stat. § 802.06(2)(a)(2), (6), (7), (10). “A motion to dismiss tests the legal sufficiency of the complaint.” *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 24, 389 Wis. 2d 669, 937 N.W.2d 37. The Court must “accept all facts pleaded in the complaint as true.” *Id.* However, “legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. “Upon the filing of a motion to dismiss under [Wis. Stat. § 802.06(2)(a)(6)] ... all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary.” Wis. Stat. § 802.06(1)(b).

ARGUMENT

I. Plaintiffs fail to state a claim under the Uniform Declaratory Judgments Act.

Plaintiffs do not allege violation of any statute. The Declaratory Judgments Act allows a person to have his rights determined when he alleges the defendant has done something “illegal under Wisconsin statutes.” *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶ 4, 403 Wis. 2d 607, 976 N.W.2d 519. *White*, for example, alleged that WEC’s 2016 guidance directly violated

Wis. Stat. § 6.87. *See White*, 2022-CV-001008, Doc. 1 (July 12, 2022). The Waukesha County Circuit Court’s injunction put a stop to those violations. But Plaintiffs’ complaint contains no such allegation. Plaintiffs do not argue that WEC’s prior or existing guidance is contrary to law or otherwise exceeds WEC’s authority. Instead, they manufacture ambiguity and say the ambiguity must be construed in their favor, but they point to no *conflict* or *violation* (actual or threatened) that provides them with a cause of action against Defendants.

The Declaratory Judgments Act requires a violation. A person “may have determined any question of construction or validity arising under the ... statute.” Wis. Stat. § 806.04(2). But the very next paragraph (labeled “Before breach”) says that a “*contract* may be construed either before or after there has been a breach thereof.” *Id.* § 806.04(3) (emphasis added). That the legislature allowed parties to seek construction of a contract in the absence of an actual (or threatened) breach implies they *did not* allow parties to seek a construction of a statute in the absence of an actual (or threatened) breach. That rule makes sense, as any other rule would open the floodgates to litigants seeking advisory opinions on all sorts of ambiguities in Wisconsin law. The more sensible interpretation of the Declaratory Judgments Act requires an allegation of an actual or threatened breach of some statute before asking a court to construe that statute. Plaintiffs’ complaint lacks any sort of allegation. It thus fails to state a claim.

II. Plaintiffs’ complaint is an improper collateral attack on the *White* judgment.

If this Court and the Waukesha County Circuit Court do not jointly transfer this case, then this Court should dismiss Plaintiffs’ complaint as an improper collateral attack on the Waukesha County Circuit Court’s judgment. “A collateral attack on a judgment is ‘an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.’” *In re Brianca M.W.*, 2007 WI 30, ¶ 27, 299 Wis. 2d 637, 728 N.W.2d 652 (citation omitted). “Wisconsin

courts have recognized the general disfavor of allowing collateral challenges on the basis that ‘they disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice.’” *Id.* at ¶ 28 (citation omitted). “This rule rests on comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results.” *Syver v. Hahn*, 94 N.W.2d 161, 164 (1959) (citation omitted). Wisconsin courts generally apply the comity doctrine “between the same parties,” *id.*, but that should not foreclose applying the doctrine in this case.

First, many courts have recognized that the doctrine is broader than cases involving identical parties. “Use of the ‘comity’ label is somewhat misleading” in cases involving different plaintiffs, but it still applies. *Feller v. Brock*, 802 F.2d 722, 728 (4th Cir. 1986). That is because even when one case has ended, “the district court’s supervisory power over its injunction continues.” *Id.* Stated generally, “[p]rudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders.” *Id.* at 727-28. Indeed, “issuance of [a] preliminary injunction” that conflicts with another court’s existing injunction does “a grave disservice to the public interest in the orderly administration of justice.” *Id.* at 727. The federal courts of appeals are thus “generally in agreement that principles of comity restrain a district court from enjoining an action underway in a sister court.” *Nat’l Union Fire Ins. Co. of Pittsburgh v. Payless Shoesource, Inc.*, No. C-11-1892, 2012 WL 3277222, at *8 (N.D. Cal. Aug. 9, 2012) (collecting cases).

Second, Plaintiffs explicitly seek an injunction from this Court that will disrupt the Waukesha County Circuit Court’s injunction. That is the goal of this lawsuit. Plaintiffs seek to

“restore the functional result of the 2016 guidance” that the court enjoined in *White*. Doc. 1 at 9. The *White* injunction lies at the heart of Plaintiffs’ complaint. They fault the Waukesha County Circuit Court for stripping election officials of guidance, and they say injunction will sow confusion and disenfranchise voters. Doc. 1 at 7-8. Plaintiffs ask this Court for a competing injunction to nullify the *White* injunction. Doc. 1 at 20. But that “would unavoidably lead to perpetual collision and be productive of most calamitous results.” *Syver*, 94 N.W.2d at 164. If comity ever applies, it is in this case.

Third, Plaintiffs are covered by the relief in *White*. A declaratory judgment necessarily provides statewide relief. The *White* injunction grants relief to all Wisconsin voters in that it enjoins WEC from violating state law against any of them. *See White*, 2022-CV-001008, Doc. 188 (Oct. 3, 2022). That includes Plaintiffs in this case. Plaintiffs are thus “parties” to the relief in *White* even if they are not parties to the case itself. That is precisely why Plaintiffs claim to be injured by the *White* injunction. Doc. 1 at 8. Plaintiffs’ lawsuit is an explicit “attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.” *In re Brianca M.W.*, 2007 WI 30, ¶ 27 (citation and internal quotation marks omitted). This Court should not entertain it.

Fourth, granting Plaintiffs’ requested relief will subject WEC to conflicting judgments, and voters to conflicting guidance. The *White* injunction involved an ongoing conversation between WEC and the Waukesha County Circuit Court. The court held a motions hearing on September 7 and granted a temporary injunction the same day. On September 13, the court held another hearing on motions to stay the temporary injunction, and regarding the scope of the injunction. The next day, WEC published guidance on its website regarding the injunction. *See*

Temp. Inj. on WEC Guidance, supra. On October 3, the court converted the temporary injunction into a permanent injunction, modifying it in accordance with its discussions with the parties. *See White*, 2022-CV-001008, Doc. 188 (Oct. 3, 2022). The court also denied the motions to stay the injunction pending appeal. Plaintiffs ask this Court to undermine that entire process, subjecting WEC to conflicting judgments. Plaintiffs' success in this case would also necessarily subject voters to conflicting guidance in an approaching election. Both outcomes would "undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." *In re Brianca M.W.*, 2007 WI 30, ¶ 28 (citation omitted).

III. Plaintiffs have not met the statutory prerequisites to sue Maribeth Witzel-Behl.

The Court should also dismiss Maribeth Witzel-Behl as an improper Defendant. Wisconsin law requires that an elector challenging the decision of an election official may file a complaint with WEC "requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law." Wis. Stat. § 5.06(1). Filing a complaint with WEC is a precondition to filing suit. *Id.* § 5.06(2); *see also Teigen*, 2022 WI 64, ¶ 46 (noting that section 5.06 applies to "Election officials," but not to WEC itself). Plaintiffs do not allege that they filed a complaint with WEC against Witzel-Behl or that WEC resolved such a complaint. Plaintiffs failed to meet the critical statutory requirements to file suit against Witzel-Behl, so this Court lacks competency to adjudicate those claims. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 21, 370 Wis. 2d 595, 882 N.W.2d 738; *Teigen*, 2022 WI 64, ¶ 44. To the extent the Court is concerned that Witzel-Behl's presence complicates the transfer issue, the Court should simply dismiss Witzel-Behl as an improper party and transfer the case.

CONCLUSION

Plaintiffs' only requests are for declaratory and injunctive relief to undermine the *White* injunction. If either this Court or the Waukesha County Circuit Court chooses not to transfer this case, then this Court should dismiss the entire complaint as an inappropriate collateral attack on a coordinate court's judgment. The Whites respectfully request that the Court resolve the motion to dismiss before ruling on Plaintiffs' motion for a temporary injunction. Wis. Stat. § 802.06(1)(b).

Dated: October 6, 2022

Respectfully submitted,

Electronically signed by Bryant M. Dorsey
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*Application for admission *pro hac vice*
pending