

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 6

ANDREW WAITY, SARA BRINGMAN,
MICHAEL JONES and JUDY FERWERDA,

Plaintiffs,

v.

Case No. 21-CV-589

Case Code: 30952

ROBIN VOS, in his official capacity,
and DEVIN LEMAHIEU, in his official capacity,

Defendants.

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF
MOTIONS FOR *EX PARTE* TEMPORARY RESTRAINING ORDER AND
FOR TEMPORARY INJUNCTION**

I. Introduction

The Plaintiffs, Wisconsin taxpayers Andrew Waity, Sara Bringman, Michael Jones, and Judy Ferwerda, (hereinafter “the Plaintiffs”) have moved for a temporary restraining order and temporary injunction against the illegal expenditure of public funds under contracts for legal services for the Wisconsin Assembly and Wisconsin Senate that the Defendants, which Assembly Speaker Robin Vos (“Robin Vos” or “Vos”) and Senate Majority Leader Devin LeMahieu (“Devin LeMahieu” or “LeMahieu”) entered into without any legal authority.

A temporary restraining order will ensure that until the Plaintiffs’ motion for temporary injunction can be heard and decided by the court, the continued illegal expenditure of public funds that was authorized by Vos and LeMahieu under the two contracts described herein will be suspended, and that Vos and LeMahieu will be

prohibited from entering into any similarly *ultra vires* contracts. A temporary injunction will provide that same protection during the pendency of this action. The precise terms that the Plaintiffs propose for the temporary restraining order, and for the temporary injunction, are set forth in Plaintiffs' proposed orders granting those motions, which are submitted herewith.

II. Facts

On December 23, 2020, Robin Vos, in his official capacity as the Speaker of the Assembly on behalf of the Wisconsin Assembly, and Devin LeMahieu, in his official capacity as Majority Leader-elect of the Wisconsin Senate on behalf of the Wisconsin Senate, contracted with the law firm of Consovoy McCarthy PLLC (in association with Adam Mortara) (hereinafter "the Consovoy contract") for pre-litigation consulting, strategic litigation direction, and legal representation in future possible litigation related to decennial redistricting. The specific nature and scope of representation described in it is, in relevant part, as follows:

This Engagement Agreement sets forth the terms under which Consovoy McCarthy PLLC ("CM") in association with Adam Mortara ("Mortara") (collectively, "CM&M") will represent the Wisconsin State Assembly and Wisconsin State Senate (the "Legislature" or "you") in possible litigation related to decennial redistricting (the "Litigation"). CM&M's engagement hereunder is limited to representing the Legislature in the Litigation through trial and, if requested, on appeal.

The parties currently do not know whether or in what venue the Litigation will occur.

Scope of Representation

The Legislature is also retaining Bell Giftos St. John LLC ("BGSJ") to represent it in the Litigation. CM&M is being retained to work alongside

BGSJ. Mortara will provide overall strategic litigation direction, take key fact and expert discovery, and serve as lead trial counsel at trial, while BGSJ and CM will provide additional day-to-day litigation resources.

Mortara hereby commits that the Litigation will take precedence over other clients as to trial scheduling matters, and that in the event of an irresolvable trial date conflict between you and another client, he will be lead trial counsel in this matter.

(Complaint, Ex. A, p. 1) (emphasis added).

When Vos and LeMahieu executed the contract, there was no action pending in any court in Wisconsin or federal court about the State of Wisconsin's decennial redistricting. There still is no such "action." (Affidavit of Beauregard William Patterson) Therefore, neither the Wisconsin Assembly nor Wisconsin Senate can possibly be a party to an "action" or have an interest that is affected in an "action" about such redistricting.

It is apparent that Vos and LeMahieu knew that no such action existed because the Consovoy contract states that "[t]he parties currently do not know whether... Litigation will occur." Nevertheless, the Consovoy firm has been paid public funds in the amount of \$30,000 per month "[f]or pre-litigation consulting, beginning January 1, 2021." (Dkt. 3, Complaint, Ex. A, p. 1)

Vos and LeMahieu also illegally contracted with Bell Giftos St. John LLC ("BGSJ") on behalf of the Wisconsin State Assembly and Senate respectively. ("the BGSJ contract") In addition to providing representation in possible redistricting litigation on an hourly basis, BGSJ also agreed to provide other legal services and confidential legal advice to Vos and LeMahieu on an hourly basis regarding redistricting, stating:

The purpose of this letter is to confirm the scope and terms of representation.

Identity of the Clients. Our clients in this matter are the Wisconsin State Senate, by and through Senator Devin LeMahieu, and the Wisconsin State Assembly, by and through Representative Robin Vos. It is our understanding that each of you is authorized to retain counsel on behalf of your respective legislative houses.

Unless and until the Wisconsin State Senate and Wisconsin State Assembly designate otherwise, we will take direction on this matter through those organizations' duly authorized agents: Senator LeMahieu as it relates to the Wisconsin State Senate; Representative Vos as it relates to the Wisconsin State Assembly.

Scope of Representation. **Bell Giftos St. John LLC agrees to provide legal advice to, represent, and appear for and defend the Wisconsin State Senate and Wisconsin State Assembly on any and all matters relating to redistricting during the decennial period beginning on January 1, 2021. Services within the scope include all services in furtherance of this attorney-client relationship relating to redistricting. Such services include, for example, providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos) regarding constitutional and statutory requirements and principles relating to redistricting. It also includes appearing for clients in judicial or proceedings relating to redistricting, should such an action be brought, or administrative actions relating to redistricting, such as the rule petition currently pending before the Wisconsin Supreme Court. It also includes providing legal advice about the validity of any draft redistricting legislation if enacted. It does not include, however, the drawing of redistricting maps.**

(Dkt. 3, Complaint, Ex. B, pp.1-2) (emphasis added).

When Vos and LeMahieu executed the BGSJ contract, there was no action pending in any court in Wisconsin or in any federal court related to the State of Wisconsin's decennial redistricting. It is apparent that Vos and LeMahieu knew that because the BGSJ contract states that litigation services will be provided "in judicial or

proceedings relating to redistricting, **should such an action be brought.**" *Id.* at 21 (emphasis added).

There is no section of the Wisconsin Constitution authorizing the Speaker of the Assembly, like Vos, or the Majority Leader of the Senate, like LeMahieu, in their official capacities, to enter into such contracts on behalf of legislative bodies with private law firms. Nor is there any Wisconsin constitutional authority that allows them to direct that public funds be used to pay for such services.

Wis. Stat. § 13.124 is the only legal authority which provides the Speaker of the Assembly and the Majority Leader of the Senate any authority to "obtain legal counsel other than from the department of justice with the cost of representation paid from the appropriation under s. 20.765 (1) [(a) or (b)],"¹ and that authority is limited to engaging representation "in any action in which the senate is a party or in which the interests of the [senate or assembly] are affected, as determined by the [senate majority leader or the speaker of the assembly]." That statute does not permit the Speaker of the Assembly or the Senate Majority Leader to engage legal counsel "outside of the department of justice" *in anticipation of* an action. Nor does it allow them to authorize the use of public funds from the sum sufficient appropriation to engage private counsel for general representation and legal advice regarding a matter, like redistricting, that is not before a court in an action.

¹ Wis. Stat. § 20.765 (1)(a) and (b) appropriates a "sum sufficient" only for the functions of the Assembly and Senate respectively. It is hereinafter referred to as the "sum sufficient appropriation."

III. Argument

A. The standards for temporary injunctive relief.

The award of temporary injunctive relief is within the court's sound discretion. *State v. C. Spielvogel & Sons Excavating, Inc.*, 193 Wis. 2d 464, 479, 535 N.W.2d 28 (Ct. App. 1995). To obtain a temporary injunction, a movant must show: (1) a reasonable probability of ultimate success on the merits, (2) that the movant would suffer irreparable harm in the absence of a temporary injunction, (3) that a temporary injunction is necessary to preserve the status quo, and (4) that the movant has no other adequate remedy at law. *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶¶93, 393 Wis. 2d 38 946 N.W.2d 35, citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (1977).

IV. The Plaintiffs have met the standards necessary for the court to issue a temporary injunction.

A. The Plaintiffs have a reasonable likelihood of prevailing on the merits of their claim.

Vos and LeMahieu exceeded their statutory authority when they entered the Consovoy and BGJS contracts on behalf of the Wisconsin State Assembly and Senate. The sole authority for any legislative body to hire private legal counsel is found in Wis. Stat. § 13.124, which is entitled "Legal Representation." It is the only statute that provides any authority for the Speaker of the Assembly or the Majority Leader of the Senate to "obtain legal counsel other than from the department of justice," and further allows for "the cost of representation paid from the appropriation under s. 20.765 (1) [(a) or (b)]." Wis. Stat. § 13.124 (1)(b) and (2)(b). Wis. Stat. § 20.765 (1)(a) and (b)

appropriates a “sum sufficient” only for the functions of the Assembly and Senate respectively.

Wis. Stat. §§ 13.124 (1)(b) and (2)(b) are clear and unambiguous. To interpret them, the court need only look at their words. *State v. Peters*, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 665 N.W.2d 171 (“If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute’s meaning.”); *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.”) (quotation marks and citation omitted).

Wis. Stat. §§ 13.124 (1)(b) and (2)(b) are “clear on their face.” They allow the Speaker of the Assembly and the Senate Majority Leader to obtain legal counsel “outside of the department of justice” and use the sum sufficient appropriation to pay such counsel only “in any **action** in which the [Assembly or Senate, respectively] is a party or in which the interests of the [Assembly or Senate, respectively] are affected, as determined by the [Speaker of the Assembly or the Senate Majority Leader, respectively].”

Wis. Stat § 801.01 (1) states:

Proceedings in the courts are divided into actions and special proceedings. In chs. 801 to 847, “action” includes “special proceeding” unless a specific provision of procedure in special proceedings exists.

In Wisconsin, an action exists when it is commenced, not before. See Wis. Stat. § 801.02 (1)-(5). Before an action exists, no individual or entity is or can be a party to it. Nor can their interests be affected by it.

The text of Wis. Stat. §§ 13.124 (1)(b) and (2)(b) (and 3(b)) does not authorize the Speaker of the Assembly or the Senate Majority Leader to engage legal counsel “outside of the department of justice with the cost of representation paid from the [sum sufficient appropriation]” for representation in an action that does not yet exist. Nor do they give either the Speaker of the Assembly or the Senate Majority Leader the authority to “obtain legal counsel other than from the department of justice with the cost of representation paid from the [sum sufficient appropriation]” for general representation and legal advice regarding a matter such as redistricting when no action is pending. No other statute allows this, either.

Nevertheless, Vos and LeMahieu engaged the Consovoy law firm for legal services about “possible” rather than actual “litigation related to decennial redistricting,” in other words, in connection with an action that does not exist. Then Vos and LeMahieu authorized payment out of the legislature’s sum sufficient appropriation at \$30,000 a month to Consovoy starting on January 1, 2021 for litigation services, even though they did not know “whether... Litigation will occur.” (Dkt. 3, Complaint, Ex. A, p. 1).

Vos and LeMahieu entered into the BGSJ contract for the same “possible” litigation. Additionally, through the BGSJ contract, and despite having no authority to do so, Vos and LeMahieu contracted for legal advice for the Assembly and Senate about

the constitutionality of proposed redistricting plans/legislation. They did so even though attorneys at the Wisconsin Department of Justice, and at the Wisconsin Legislative Council,² are available to provide such legal advice.

The Speaker of the Assembly and Majority Leader of the Senate first acquired authority to hire outside counsel on behalf of legislative bodies only a few years ago, in 2017 Wisconsin Act 369, Section 3, which created Wis. Stat. § 13.124. Had the Legislature intended for the Speaker and Senate Majority Leader to have the authority to obtain private legal counsel for those bodies for actions that do not yet exist, or for general legal advice, it would have written the statute differently.

“The legislature is presumed to know the status of existing law, and to have chosen its words carefully.” *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 14, 256 Wis. 2d 859, 868, 650 N.W.2d 81, 85 (citations omitted). The legislature could have created Wis. Stat. § 13.124 (2)(b), for instance, to state:

The senate majority leader, in his or her sole discretion, may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (b), in any **claim on which the senate is or may become a party in any action in state or federal court or on any claim on which the interests of the senate are or may be affected**, as determined by the senate majority leader. The senate majority leader shall approve all financial costs and terms of representation.

² Wisconsin Legislative Council is a legislative service agency created under Wis. Stat. § 13.91 (1)(c) and is a part of the Legislative branch.
<https://researchguides.library.wisc.edu/c.php?g=125275&p=820037#:~:text=Wisconsin%20Legislative%20Council,Council%20supports%20effective%20lawmaking%20by%3A&text=Preparin g%20informational%20publications%20for%20Legislators,service%20agencies%2C%20and%20Legislative%20staff>. (last visited March 12, 2021)

It could have provided similar authority with respect to the Assembly in Wis. Stat. § 13.124 (1)(b), and with respect to the Legislature in Wis. Stat. § 13.124 (3)(b) as well. The legislature did not do so.

The terms of Wis. Stat. § 13.124 (1)(b), (2)(b), and (3)(b) are clear and unambiguous. Thus “[the court] appl[ies] them as written without any further inquiry.” *In re Charles R.P.*, 223 Wis. 2d 768, 771, 590 N.W.2d 21 (Ct. App. 1998). The Plaintiffs have shown that Vos and LeMahieu entered into the Consovoy and BGSJ contracts in violation of Wis. Stat. § 13.124 (1)(b) and (2)(b). Those contracts are void *ab initio* and all past and future payments from the sum sufficient appropriation under those contracts are misappropriations of funds provided by taxpayers.

B. The Plaintiffs have no adequate remedy at law and will suffer irreparable harm if an injunction is not granted to the Plaintiffs.

To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. To invoke the remedy of injunction the plaintiff must moreover establish that the injury is ... not adequately compensable in damages.” *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶42, 264 Wis. 2d 60, 665 N.W.2d 257. As detailed above, the Defendants are engaging in the illegal expenditure of taxpayer dollars and the illegal retention of outside counsel, resulting in the diversion of critical State resources from otherwise lawful activities.

To date, at least \$30,000 of taxpayer funds were misappropriated in January 2021, and again in February 2021, to pay retainer fees of the Consovoy contract. An additional

\$30,000 is due to be paid this month. At a minimum, under the terms of the contract, those illegal payments will continue in ensuing months unless they are enjoined. Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. *Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961).

However, as taxpayers the Plaintiffs cannot sue to recover that loss through an action at law. Irreparable harm is that which is not adequately compensable in damages. *Pure Milk Prods. Co-op v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Consequently, the Plaintiffs, as taxpayers, have been and will continue to be irreparably harmed. Injunctive relief is the only remedy available to them.

V. Neither the Defendants nor the public will be harmed by the issuance of a temporary injunction and the "status quo" will be maintained.

Neither the Speaker of the Assembly nor the Senate Majority Leader have the authority to contract private counsel in preparation for a possible legal action or to engage private counsel to provide confidential legal advice on the validity/constitutionality of proposed legislation. Their only authority to engage counsel other than the Wisconsin Department of Justice is limited and found in Wis. Stat. § 13.124.

Enjoining Vos and LeMahieu from continuing to use attorneys through the Consovoy and BGSJ contracts is necessary to preserve the status quo. "[S]tatus quo" is "the last peaceable, uncontested status of the parties which preceded the actions giving rise to the issue in controversy." *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.*,

123 F. Supp. 2d 470, 473 (E.D. Wis. 2000); *accord, e.g., Stemple v. Bd. of Educ. of Prince George's Cty.*, 623 F.2d 893, 898 (4th Cir. 1980).

The status quo that existed before Vos and LeMahieu executed the Consovoy and BGSJ contracts at issue was that the Wisconsin Assembly and Senate had no outside counsel, and no legal authority to engage or pay outside counsel, unless there was an existing action in which those legislative bodies needed representation because they were parties to an action or the entities' interests were affected by the action. To maintain the status quo, the Court must enjoin Vos and LeMahieu from authorizing any payment on the Consovoy and BGSJ contracts and enjoin Vos and LeMahieu from signing any other contracts for legal services when there is no corresponding action that the Assembly or Senate is a party to or in which they have an affected interest.

Neither Vos nor LeMahieu, nor the legislative bodies themselves, will be harmed by a temporary injunction enjoining the Defendants during the pendency of this action from engaging counsel outside of the Department of Justice for legal services for the legislative bodies. They will not be deprived of legal counsel because they continue to have full access to the attorneys at Department of Justice and the Wisconsin Legislative Council.

Nor will the public's interest be harmed by a temporary injunction. It will be enhanced because the public's funds will be preserved while the court considers the motion for temporary restraining order and, once it is granted, during the pendency of this case.

VI. Conclusion

The Court should grant Plaintiffs' *ex parte* motion for temporary restraining order and Plaintiffs' motion for temporary injunction under the terms requested therein.

Respectfully submitted this 16th day of March, 2021.

PINES BACH LLP

Electronically signed by Lester A. Pines

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