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November 6, 2015

HAND DELIVERY
Honorable Lee S. Dreyfus
Waukesha County Courthouse
515 West Moreland Boulevard
Waukesha, WI 53186

RE: Wisconsin Club for Growth, Inc., et al. v. Wisconsin Government Accountability Board, et al.
Case No. 14-CV-1139

Dear Judge Dreyfus:

Enclose for filing please find the following:

- Plaintiffs' Combined Opposition to Defendants' October 26th and October 30, 2015 Memoranda Regarding the Sealing of Summary Judgment and Other Filings.

Copies have been served on opposing counsel as of today's date.

Very truly yours,

MATTHEW W. O'NEILL

MWO:ljc

Enclosures

CC: Attorney Paul Schwarzenbart (via mail and email)
Attorney Lucinda Luetkemeyer (via mail and email)

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

ERIC O'KEEFE, and WISCONSIN CLUB FOR GROWTH, INC., individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	**Civil Case No. 14CV01139**
v.	)	**Case Code 30701**
WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, and	)	**Branch 5**
KEVIN J. KENNEDY, in his official capacity,	)	
Defendants.	)	

PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANTS' OCTOBER 26TH AND OCTOBER 30, 2015 MEMORANDA REGARDING THE SEALING OF SUMMARY JUDGMENT AND OTHER FILINGS

Plaintiffs Eric O'Keefe and Wisconsin Club for Growth, Inc. ("Plaintiffs") respectfully request public disclosure of parts of recent filings that Defendants argue should remain sealed.

In resolving Plaintiffs' September 15, 2015, request to lift the protective order that still blankets much of this case, this Court ordered that any party desiring to keep filed materials under seal must serve a memorandum carrying its burden of proving the need for secrecy. The memorandum must be served within 10 days of the filing of materials. Defendants have now made two such filings: (1) an October 26, 2015 Memorandum Addressing Sealed or Redacted Status of Summary Judgment Filings; and (2) an October 30, 2015 Memorandum Addressing sealed or Redacted Status of Plaintiffs' Challenge to Confidentiality Designations. Although the parties agree that subjects and targets of the GAB's investigation should not be further injured by

having their identities revealed in this case, they disagree on several other points. Defendants continue to improperly argue that the still-murky concept of "materiality" and rules relating to admissibility of evidence at jury trials should trump the core First Amendment principle of public access to court filings. As a matter of law, Defendants' newly-invented justifications can have no role in deciding how much the Wisconsin public learns about the arguments and facts Plaintiffs and Defendants are presenting in this Court. Nor do they justify attempts to cloak the GAB's conduct from Wisconsin taxpayers.

Further, for large swathes of its secrecy demands, the GAB provides no explanation at all, simply copying the same objection again and again. The GAB has the burden of proof, and for many of the documents, this was the GAB's third chance to explain the factual and legal basis for secrecy. Enough is enough. Plaintiffs respectfully request that this Court find that the GAB has not met its burden of justifying continued secrecy relating to its conduct. Especially now that a change in law has removed the shackles of John Doe secrecy from the Plaintiffs, Defendants' attempts at sealing must be overruled so that the public can gain immediate access.

I. BACKGROUND

On September 15, 2015, Plaintiffs moved this Court to amend its Protective Order, and specifically asked for two forms of relief: (1) an order allowing the public disclosure of the documents contained in a 181-page "Exhibit A" to the motion; and (2) an order stating that no matters would remain confidential or under seal, except for substantive John Doe II evidence, or the names or identifying information of John Doe subjects or targets. The parties extensively briefed the matter, and the GAB agreed to remove its designations over many documents in the 181-page Exhibit A. However, the GAB also introduced a new concept—materiality—that it claimed would provide an independent basis for blocking public access to arguments and facts.

In an October 15, 2015, oral ruling, this Court found that the lack of "materiality" is not a legal basis for sealing or redacting documents or facts. However, the Court denied Plaintiffs' motion at the present time, with the exception of a few dozen pages in "Exhibit A" that GAB had agreed to unseal or un-redact. The Court asked Plaintiffs to draft the written order.[1]

Relevant here, the Court also ordered a new process to speed the resolution of disputes regarding sealing and redaction. Parties may now no longer simply file documents under seal or with substantial redactions, and then rest on secrecy while awaiting a challenge, motion, and eventual decision granting public access (as under the original version of this Court's protective order). Rather, within ten days of the filing of a document containing material previously marked "confidential," any party seeking to keep these materials from public view must file a memorandum sufficient to sustain their burden of invoking secrecy.

This process has now begun. First, on October 16, 2015, Defendants filed a motion for summary judgment. Following the process, on October 26, 2015, Defendants filed their Memorandum Addressing Sealed or Redacted Status of Summary Judgment Filings (the "October 26 Memo"). Second, on October 22, 2015, Plaintiffs re-filed public versions of their own papers in support of their September 15, 2015 protective order motion, maintaining redactions only of those items the Defendants had previously insisted should remain secret.[2]

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[1] This oral ruling is awaiting this Court's final written order under Local Civil Rule 1.5 . After conferring with Defendants immediately after the Court's oral ruling, Plaintiffs submitted a proposed order on October 21, 2015. Defendants submitted a slightly different order on October 22, 2015. The orders differ in that Defendants would omit a procedure and timeline for the resolution of disputes over the continued redaction of sealed filings. (The Defendants' October 26 and October 30, 2015, memoranda, and this Response by Plaintiffs, are an example of such a dispute.) Also, Plaintiffs' order includes this Court's decision on the legality of "materiality" as a basis for blocking public access, while Defendants would omit it.

[2] This re-filing was meant to bring Plaintiffs' filings into compliance with the original protective order, which required that public versions of filings be made with only those redactions necessary to preserve materials designated as "confidential." Plaintiffs conferred with Defendants' counsel about this re-filing

Again following the process, on October 30, 2015, Defendants filed their Memorandum Addressing Sealed or Redacted Status of Plaintiffs' Challenge to Confidentiality Designations (the "October 30 Memo").

Plaintiffs' current filing is a combined response to both the October 26 and October 30 Memos. Plaintiffs maintain that most of Defendants' objections cannot be sustained under the law, and that many of them are not even accompanied by particularized argument. Because the GAB's conduct is squarely at issue in this case, and is a focus of intense legislative and political concern, the public has a heightened First Amendment interest in learning Plaintiffs' claims about what the GAB and its agents were up to between August 2012 and the spring of 2015. For the reasons discussed below, Plaintiffs respectfully request that this Court allow Plaintiffs to publicly file and disclose the disputed materials without further delay.

II. NONE OF THE GAB'S THREE ASSERTED BASES FOR SECRECY ARE RECOGNIZED UNDER WISCONSIN LAW

Now, for the very first time since July 24, 2014 (when this Court first ordered the parties to specify the precise legal basis supporting each proposed redaction or sealing),[3] the GAB has attempted to explain which (if any) of the GAB confidentiality statutes or the John Doe secrecy order justifies each of its proposed redactions. Plaintiffs have long argued that the GAB should be forced to comply with the original order, and that once it did, its generalized arguments for secrecy would evaporate. As discussed below, Plaintiffs submit that this has now happened.

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process in advance; both recognize the need to revisit prior filings that were made wholly under seal, and "re-file" those so that the public has maximum access and only "confidential" designated items remain under seal or redaction. This process will likely continue in the coming weeks. In fact, on October 30, 2015, Defendants made their first "re-filing" to begin the process of bringing themselves into compliance with the original protective order.

[3] The July 24, 2014 Protective Order requires that "all designations must be made in good faith and state under the designation whether the confidentiality arises from '§ 12.13(5),' '§ 5.05(5s) and § 12.13(5),' or the 'Secrecy Order.'"). *See* Protective Order, ¶ 7. It also requires that "the party asserting the designation of confidentiality carries the burden of demonstrating that the designation is appropriate". *Id.* at ¶ 8.

A. The GAB Can No Longer Use the John Doe Secrecy Order to Muzzle Plaintiffs' Efforts to Inform the Public About its Claims, Which Are Substantiated by the GAB's Production and Filings in this Case.

The parties' previous debate about whether the John Doe Secrecy Order barred Plaintiffs' public disclosure has been rendered obsolete by a recent change in law. As of October 24, 2015, a new law reforming certain parts of the John Doe process, Act 64, became the law of this state. *See* http://docs.legis.wisconsin.gov/2015/related/acts/64. Among other things, Act 64 provides that John Doe secrecy orders cannot apply to the Plaintiffs; it can only apply judges, attorneys, or others who participate in or admitted to the proceeding:

> **SECTION 6.** 968.26 (4) of the statutes is created to read:
>
> 968.26 **(4)** (a) The judge may enter a secrecy order upon a showing of good cause by the district attorney. A secrecy order under this paragraph may apply to only the judge, a district attorney or other prosecuting attorney who participates in a proceeding under this section, law enforcement personnel admitted to a proceeding under this section, an interpreter who participates in a proceeding under this section, or a reporter who makes or transcribes a record of a proceeding under this section. No secrecy order under this section may apply to any other person.
> (b) If a judge enters a secrecy order under par. (a), the judge shall terminate that secrecy order if any person applies to the judge for the termination and establishes that the good cause shown under par. (a) no longer exists. If a judge terminates a secrecy order entered under par. (a), the identity of the subject of the proceeding under this section may not be disclosed without the subject's consent, except as provided in par. (c).

Id.

Further, there can be no question that this provision controls the very John Doe order at issue in this case: it applies to any John Doe order in effect as of October 24, 2015, the effective date of the law, and any part of the order that would extend the secrecy provisions to "persons not listed" under the new secrecy provisions, including Plaintiffs, is "terminated":

SECTION 12J. Nonstatutory provisions.

(1) A secrecy order entered under section 968.26 of the statutes that is in effect on the effective date of this subsection may apply only to persons listed in section 968.26 (4) (a) of the statutes, as created by this act. A secrecy order covering persons not listed in section 968.26 (4) (a) of the statutes, as created by this act, is terminated on the effective date of this subsection.

Id. Plaintiffs have already argued at length that Judge Peterson's Use and Dissemination Order had made it clear that the decision to grant public access to filings in this case rested with this Court. In fact, the GAB participated in obtaining the order from Judge Peterson and crafted the order so that Judge Peterson would not need to issue additional orders to allow public filings in this case. *See* Plaintiffs' September 15 Motion to Modify the Protective Order, Ex. C. As Plaintiffs have argued, the GAB changed its tune only after realizing that reams of communications damaging to the GAB's public claims had been produced in this case; at that point, the GAB claimed that it had the unfettered right to pick and choose what parts of the filings it would allow the public to see. Additionally, Plaintiffs showed that the original John Doe Secrecy Order (as allowed under the old, pre-Act 64 version of the John Doe statute) did not reach many of the documents the GAB claimed were confidential.

At any rate, this debate is now academic. Since by operation of statute the John Doe Secrecy Order now applies only to the prosecutors and GAB, and not to subjects or targets like the Plaintiffs, it can no longer sustain efforts to block public access to productions or filings in this case. The sole remaining force of the Secrecy Order is to block disclosure of the identities of the subjects of John Doe II without their consent. *See* Wis. Stat. 968.26(4)(b) (if a judge terminates a secrecy order, "the identity of the subject of the proceeding under this section may not be disclosed without the subject's consent, except as provided in par. (c)."). At this stage, the

GAB can no longer wield the John Doe Secrecy Order to trump Plaintiffs' desire to make public filings and disclosures.

B. GAB Confidentiality Does Not Apply to the Plaintiffs, and the GAB Cannot Appoint Itself the Gatekeeper to Public Access Based on its Own Decisions about Whether Documents Are "Material" to the Parties' Arguments

The GAB continues to assert that the confidentiality statute barring the GAB from making public disclosures regarding its investigations also applies to Plaintiffs. *See* October 26 Memo, pp. 1-2; October 30 Memo, p.3 (citing Wis. Stat. §§ 5.05(5s); 12.13(5)). Starting from this false premise, the GAB claims that specific facts in documents filed by either party may be publicly revealed under only one condition: the *Defendants* must determine that they have been "presented in court." *See* October 30 Memo, p.3 (stating at points 4 and 5 that materials in *Plaintiff's* filings must be sealed because "Defendants have not 'presented [them] in court").

Now the Defendants proceed a step further, altering once again their "materiality" argument that this Court disapproved in its October 6, 2015, oral ruling on Plaintiffs' confidentiality motion. First, they posit that documents they deem "not relevant to the merits" of Plaintiff's claims are not material, and therefore are not "presented." *See* October 30 Memo (at points 3 and 4, claiming that "relevance to the merits" is now the dividing line between public access and secrecy). Second, they import the rules of evidence, claiming that even probative documents may be concealed from the public if Defendants deem their "probative value is substantially outweighed by the danger of unfair prejudice," may lead to the confusion of the issues, may mislead "the jury," or may cause a "waste of time" or be "cumulative." *Id.* at 4 (citing Wis. Stat. § 904.03). How Defendants' judgment on these issues can possibly bar public access to Court filings, or gag Plaintiffs from making public statements about what they are arguing in this case, Defendants do not bother to explain.

Defendants' contortions have made the law—and the question of public access—far more difficult than it needs to be. Plaintiffs have demonstrated in their prior briefing that the text of the GAB confidentiality statute provides an easy answer to this question, and avoids the sort of strained and unfair reading the GAB invented after Plaintiffs began to use the documents it had produced. The answer is this: the "penalty" portion of the GAB confidentiality statute certainly prohibits the GAB from making disclosures to the public at large,[4] but it does not prohibit the GAB from making disclosures *to Plaintiffs*,[5] and it does not prohibit third parties, including Plaintiffs, from releasing this information to the public at large. *See* Attorney General Opinion OAG-7-09 ("Wis. Stat. § 12.13(5) does not apply to district attorneys or law enforcement agencies, ***but only to the GAB, its employees and agents***[.]" *Id.* at ¶ 2 (emphasis added). The companion statute, Wis. Stat. § 5.05(5s), simply carves out exceptions to the general right of public access and copying under the Open Records Law (Wis. Stat. § 19.35), and then defines the scope of documents which are covered under the "penalty" provisions. It does not purport to cover the discoverability of documents in civil litigation, nor does it have anything to do with the question of public access to court filings. It certainly does not provide that the records may never be produced in discovery, or that parties who otherwise gain access (for example, in discovery) may be barred from re-disclosing them, or gagged from making public statements about them.

The parties have litigated the interpretation of these very statutes since at least December 2014. At that time, this Court allowed the public filing and disclosure of information that was

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[4] "Except as specifically authorized by law... no . . . ***member or employee of the board*** may disclose information related to an investigation[.]" Wis. Stat. § 12.13(5)(a) (emphasis added).

[5] "***This subsection shall not apply to any of the following communications*** made by an investigator, prosecutor, employee of an investigator or prosecutor, or member of employee of the board: ...3. ***Communications made to*** the attorney of an investigator, prosecutor, employee, or member of the board or to a person or ***the attorney of a person who is investigated or prosecuted by the board.***" Wis. Stat. § 12.13(5)(b)3 (emphasis added).

unquestionably covered by both GAB confidentiality provisions, but that Plaintiffs lawfully received from the GAB in discovery. The GAB failed to raise its recent invention—the "presented in court" exception—at that time. And if the GAB's current arguments are correct, then Plaintiff's First Amended Complaint was unlawful, violated the GAB confidentiality statutes and may even have constituted a criminal act. But again, this cannot be correct—a plain text reading of the statute, supported by Attorney General Opinion OAG-7-09, shows that third parties like the Plaintiffs may lawfully obtain access to the records, and when they do, the nondisclosure provisions do not muzzle those third parties or block the public from accessing the information.

Given all of this, it is fair to take a closer look at the statutes to determine whether the GAB's new theory holds any water. The key statute in full reads as follows:

> (5) UNAUTHORIZED RELEASE OF RECORDS OR INVESTIGATORY INFORMATION.
>
> (a) Except as specifically authorized by law and except as provided in par. (b), **no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution** under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board **prior to presentation of the information or record in a court of law.**
>
> (b) **This subsection does not apply to any of the following communications** made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board:
>
> 1. Communications made in the normal course of an investigation or prosecution.
> 2. Communications with a local, state, or federal law enforcement or prosecutorial authority.
> 3. **Communications made to** the attorney of an investigator, prosecutor, employee, or member of the board or to a person or **the attorney of a person who is investigated or prosecuted by the board.**

Wis. Stat. § 12.13(5) (emphasis added). The GAB relies on a dozen words at the very end of subsection (a). It is an exception to the bar on disclosures by the GAB (*i.e.*, that "...no...member or employee of the board may disclose information related to an investigation"). Under this exception, the bar is effective only "prior to presentation of the information or record in a court of law." *Id.*

The first problem is that even without examining the rest of Chapter 12, Defendants' theory requires a legally impossible reading of Wis. Stat. § 12.13(5). It first requires the Court to extend the prohibition on disclosure, which by its plain text applies only to the GAB (and its cohort), to the Plaintiffs. Having used this sleight of hand to rope Plaintiffs into the overall prohibition, however, Defendants would reserve the exception for information "presented in court" as their exclusive right. *See* October 30 Memo at 3 (at points 4 and 5, stating that Plaintiffs' filings cannot be public if "Defendants" have not presented them to the Court.) This is despite the fact that the "presented" clause does not say *who* must have presented the information, and certainly does not say that only the GAB has the right to use the "presentation" exclusion.

The second and more fundamental problem is that the exception for a "court of law" has only questionable application in this case. It was never cited by this Court in its protective orders, and was never been cited by Defendants until recently, when they needed support for their "materiality" theory in responding to Plaintiffs' confidentiality motion. The reason for its belated appearance is simple: the "court of law" referenced in Wis. Stat. § 12.13(5) means a court handling a criminal or civil enforcement proceeding under the rest of Chapter 12 or under Chapter 5, which contains the GAB's enabling statute. Chapter 12 defines and addresses the GAB's enforcement of "Prohibited Election Practices." It is not an open records provision. Thus,

the exception for a "court of law" in Wis. Stat. § 12.13(5) refers to the enforcement proceedings that are the subject of the rest of Chapter 12. It contemplates that the GAB cannot publicly disclose the investigative records and evidence it has compiled against a party until the GAB goes to court against its target, and not "prior to" that time. This makes sense: it provides protection against efforts to pressure or embarrass targets into settlement.

The provision does not contemplate—and does not make sense in—a taxpayer standing action like this. Here, the subjects of the investigation are the plaintiffs and the GAB is the defendant. At issue is not whether the subject committed a campaign finance violation, but whether the GAB misused taxpayer dollars and committed other misconduct. The "information" will be "presented" in court by the Plaintiffs, and it will relate to how the GAB conducted the investigation—not to the Plaintiffs' campaign finance activity. Accordingly, disclosures in this case have been and should continue to be governed by other parts of the statute that apply more generally and are not difficult to construe.[6] For example, as shown above, the overall prohibition on disclosure applies only to the GAB and not to Plaintiffs. That alone resolves the issue. Additionally, the GAB is also allowed to make disclosures to counsel for subjects or targets—like Plaintiffs. That also resolves the issue.

Aside from the plain text and obvious meaning of the statute, there are other reasons to avoid applying Defendants' "presented in court" exception and its even less plausible offspring,

[6] Because it is not the "presented in Court" exception that should provide the grounds for disclosures in this case, Plaintiffs and other subjects should be protected from any attempt by the GAB to use the exception as a sword rather than a shield. For example, if "presented in court" supplies the legal rule for this case, the GAB could use this proceeding as an excuse to disclose documents or information that was wrongfully seized in John Doe II. That is not implausible: just as the GAB claims discretion to state which documents the parties have not "presented," the GAB would have discretion to "present" and disclose evidence that was originally intended for a campaign finance prosecution in this taxpayer standing case—certainly not the kind of case in which the "presented" exception was meant to apply. Thus, one reason the "presented in Court" exception simply cannot be the correct standard in a taxpayer standing case is that if applied here, it has a dangerous double edge that harms the parties it was supposed to protect.

the "materiality" standard. First, it leads to absurd results. As noted above, under Defendants' reading, they alone claim the mantle of entitlement to decide when a document or fact filed by one of the parties in a motion has, in fact, been "presented" to this Court.

Second, Defendants' application of the "materiality" standard to actual facts and documents in their October 26 and October 30 Memos reveals that it is simply a Trojan horse for importing the GAB's merits arguments into the question of public disclosure, untethered to any legal analysis of the public's interest in court proceedings, or the legitimate privacy interests of parties. This is confirmed by the history of this dispute. Defendants have simply used "materiality" to bargain for the least disclosure possible, slowly giving way document by document until only the most damaging information (or as Defendants put it, the most "immaterial") remains under seal. Indeed, Defendants seem to argue that the "materiality" standard can be used to hide from the public any facts inconsistent with their theory of the case.

For example, Plaintiffs have argued and will argue that the GAB did far more than simply provide dispassionate campaign finance advice to a concurrent criminal investigation. Rather, the GAB actively performed core prosecutorial functions in litigating John Doe II. A key document is Page 72 to Exhibit A to Plaintiffs' motion to modify the protective order. In the November 27, 2013 email exchange between the GAB's lead counsel, Shane Falk, and GAB investigator/Special Prosecutor Francis Schmitz, Falk suggests a strategy to seek recusal of certain judges while keeping other, similarly affected judges from recusing themselves. He also expresses bitter political sentiments about Wisconsin voters and corporate contributions. Through documents like this, Plaintiffs will prove that the GAB acted outside of its authority by actively performing core prosecutorial functions in litigating court battles in the Doe, long after the investigation had fallen under the province of prosecutors. Why do Defendants believe this is

"immaterial"? In their own words: "the Board took no action in regard to the subject of this email, [so] it has no bearing on whether the GAB acted within the scope of its authority." October 30 Memo at 5. The GAB cites no authority for the dubious argument that so long as its Board was kept in the dark or avoided a vote on a specific action by its lead John Doe attorney, his time and work on the Doe is "immaterial" in a taxpayer action. Yet the very fact that the GAB uses this argument to block public access to this document shows that "materiality" is truly a Trojan horse. It allows the GAB to embed its positions on the merits into this Court's analysis of public access. Armed with this new tactic, the GAB resorts to it dozens of times in the last set of filings; it objects to the disclosure of any fact that does not square with its theory of the case, and hence its theory of materiality. October 30 Memo, pp. 4-8.

Third, Defendants' "materiality" standard is not a standard at all, since in its most recent form, it imports the GAB's concerns about whether even facts with "probative value" would cause "prejudice" to the GAB or are "cumulative." *See* October 30 Memo, p. 4. While courts certainly rely on these factors when controlling the receipt of evidence in a jury trial, they should have no place in the sealing or redaction of court filings. This Court is not a jury, and given the volume of documents necessary to review on summary judgment and other motion practice, it is utterly unworkable to allow miniature motions *in limine* to require sealing and redaction of each and every fact the GAB or its staffers find prejudicial, cumulative, or embarrassing. The GAB should not be able to raise these objections again and again, hoping that the sheer quantity of paper and the prospect of piecemeal, objection-by-objection decisions will indefinitely stall a decision by this Court and block public access to important evidence about its conduct.

As shown below, the GAB's particular claims rely on these same flawed objections, over and over again. This Court noted in its oral ruling that "materiality" cannot be used to seal

documents. The GAB's new "presented in court" theory carries the patina of law because it cites part of the GAB confidentiality statute, but beneath the surface, it is simply "materiality" under another name. Now that Defendants have finally tied specific objections to specific facts and documents, Plaintiffs respectfully suggest that even this patina should evaporate. The Court should find that on at least the materials presented here, the GAB confidentiality statute cannot trump Plaintiffs' right to publicly file documents, or the public's First Amendment right to read and debate the facts they contain.

III. THE GAB'S PARTICULAR CLAIMS SHOULD FAIL

A. The GAB's October 26 Memo (Defendants' Summary Judgment Filings)

1. Affidavit of Schmitz, GAB Exhibit 18

This exhibit should be released as redacted by Defendants under their alternative argument. Defendants' claim that the John Doe Secrecy Order prohibits disclosure was incorrect when made, but with the passage of Act 64, it can no longer be sustained. Plaintiffs consent to and urge its disclosure, with appropriate redactions for the names of subjects of the Doe.

2. Affidavit of Schwarzenbart, GAB Exhibits 4 and 5

For the same reasons outlined in point 1, above, these exhibits can and should be released with redactions for the names of subjects of the Doe.

3. Affidavit of Schwarzenbart, GAB Exhibit 8

For the same reasons outlined in point 1, above, these exhibits can and should be released with redactions for the names of subjects of the Doe.

4. Affidavits of Kennedy and Becker, various exhibits

GAB Exhibits 6, 7, 11, 12, and 16. Plaintiffs have no knowledge about whether the portions that the GAB redacted in discovery are, in fact, proper, and preserve any objections as

to those redactions. For purposes of this Memo, however, Plaintiffs agree that the redactions of subjects of the investigations are proper. With the "subject" redactions maintained, these documents can and should be released.

GAB Exhibits 13, 17. Plaintiffs agree that the redactions of the subjects of the investigation are proper. However, the redaction of potential investigators' names because they are purportedly "immaterial" is improper. As discussed above, and as this Court ruled during the October 15, 2015, hearing, there is no legal basis for an objection based on immateriality. This also applies to Defendants' new but similar "presented in court" theory, which posits that parts of documents that are filed by Plaintiffs should not be considered as "presented" if Defendants believe those portions of the document are immaterial to the case.

As Plaintiffs have previously argued, the identities of the candidates are highly relevant. Plaintiffs intend to show that the GAB paid almost no attention to the restrictions in its enabling statute regarding the opening of a GAB investigation. This is because the GAB at all times knew the matter was a criminal investigation, already under the control of prosecutors, and intended that the matter be prosecuted. The GAB simply hired the Special Prosecutor, Francis Schmitz, under the expedient that he would simultaneously be paid as a special investigator of the GAB, and for that reason did not follow the statutory procedures for selecting an investigator. Disclosure of the names being considered will show that GAB staff relied mainly on a closed set of frequently-used, politically friendly lawyers.[7][8] When this failed to yield a Special

[7] Defendants claim that this argument is "ludicrous, if not insulting" and cast it as "speculation about the personal or professional character of potential investigators." October 30 Memo, p. 4, note 2. Defendants misconstrue Plaintiffs' argument, which is about how the GAB's haphazard selection process betrayed its intention to spend money on John Doe II, rather than on a bona fide GAB investigation. Plaintiffs certainly intended no comment on the "character" (personal, professional, or otherwise) of any candidate, and certainly not of Defendants' current counsel in this litigation, whom Plaintiffs hold in high regard.

Prosecutor/investigator, Francis Schmitz was offered the job and hired without following the rule requiring presentation to the Board of three candidates—and without presentation to or a vote by the Board at all. *See* Wis. Stat 5.05(2m)(4). Plaintiffs will argue that the costs of this apparent sham search, and the later expenditures on Schmitz, were unlawful. Again, the GAB cannot simply claim that it disagrees with Plaintiffs' legal theory, and that therefore the candidates' identities are "immaterial."

B. The GAB's October 30 Memo (Plaintiffs' Filings on the Protective Order)

Except for redactions of John Doe subjects' identities, all of the redactions here were made by Plaintiffs because Defendants had designated them "Confidential." Plaintiffs sought

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[8] Even more puzzling is Defendants' claim that the argument about candidates' identity "appears to be a backhanded effort to litigate whether there ever should have been an investigation." October 30 Memo, p. 4. The connection between these two concepts is unclear. What is very clear, however, is that the GAB is completely incorrect to claim that the issue of "whether there ever should have been an investigation" was "resolved against the plaintiffs" after their civil rights claim was "dismissed on the merits." *Id.* (citing *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014) cert. denied, 135 S.Ct. 2311 (2015). That is false. In fact, Judge Easterbrook's decision held that federal court was not the forum to adjudicate Plaintiffs' claims about the investigation, and further found qualified immunity on an unsettled question of law regarding the federal constitutional limits of the prosecutors' coordination theory. *Id.* Recognizing that the Plaintiffs had succeeded in convincing John Doe Judge Gregory Peterson to quash the subpoenas on the grounds that the investigation's legal theory was invalid, Judge Easterbrook directed Plaintiffs back to Wisconsin's courts. And then, on July 17, 2015, Wisconsin's highest court actually *did* pass on the question Defendants falsely attribute to a federal court—whether "there ever should have been an investigation." *See State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 133, 363 Wis. 2d 1, 97-98, 866 N.W.2d 165, 211-12. Because the GAB now directs this Court to an off-point federal case and makes no mention of controlling Wisconsin authority that it recently helped litigate, the conclusion of the Wisconsin Supreme Court seems to bear repeating:

> It is utterly clear that the special prosecutor has employed theories of law that do not exist in order to investigate citizens who were wholly innocent of any wrongdoing. In other words, the special prosecutor was the instigator of a "perfect storm" of wrongs that was visited upon the innocent Unnamed Movants and those who dared to associate with them. It is fortunate, indeed, for every other citizen of this great State who is interested in the protection of fundamental liberties that the special prosecutor chose as his targets innocent citizens who had both the will and the means to fight the unlimited resources of an unjust prosecution. Further, these brave individuals played a crucial role in presenting this court with an opportunity to re-endorse its commitment to upholding the fundamental right of each and every citizen to engage in lawful political activity and to do so free from the fear of the tyrannical retribution of arbitrary or capricious governmental prosecution. Let one point be clear: our conclusion today ends this unconstitutional John Doe investigation.

their unsealing and removal from this Court's protective order in their September 15, 2015, Motion, and the Court denied this relief. This Court did not require Defendants to state the specific legal basis for each redaction. Instead, it allowed a procedure whereby no part of a filing could remain sealed if, within 10 days, the party desirous of secrecy did not file a memorandum explaining a specific legal justification. Because Plaintiffs re-filed their motion papers, the briefs themselves (as well as the 181-page Exhibit A to the Plaintiffs' motion) are now before the Court again—this time, with the benefit of Defendants' specific arguments on each redaction.

1. Plaintiffs' Reply Brief

Plaintiffs redacted general descriptions in their Reply Brief that summarize the redacted documents; Defendants still object to allowing the public to review some of these summaries. As discussed below, Plaintiffs believe this insistence on secrecy is without merit.

a. Redaction referenced as "Pages 14-15."

Defendants object that this description includes the name of one candidate for the role of Special Prosecutor/investigator who was not hired. For the reasons discussed above, "materiality" or the lack of "presentation to this court" (which is figurative only, because Plaintiffs have now presented it several times), are not legal objections to disclosure. Additionally, the identities of the candidates are material and relevant because they demonstrate that the GAB's Special Prosecutor/investigator search focused on a closed circle of attorneys friendly or politically sympathetic to GAB staffers, and that when this failed, the GAB simply offered the job to a single person, Francis Schmitz, who was not presented to the Board as required by law. The inattention to regular statutory hiring restrictions further demonstrates that the GAB viewed itself as simply funding the John Doe Special Prosecutor and his criminal investigation, rather than as performing its own investigation which might later select either a

criminal or civil outcome. This is not a permissible investigation and not a permissible use of taxpayer dollars.

b. Redaction referenced as "Pages 42-45"

Plaintiffs' summary deals with serious issues with evidence in the investigation and shows GAB staff directly involved in core prosecutorial functions, such as the implementation of privilege filters, screening, and appellate litigation in other matters that have nothing to do with the GAB's campaign finance expertise. Again, it shows that GAB staffers simply became line prosecutors for purposes of John Doe II, not campaign finance experts "advising" a parallel investigation. Starting what becomes a disturbing pattern, Defendants' objection simply cites back to a previous objection that has nothing to do with the redacted items here, and repeats a conclusory statement that the redacted material has "no conceivably valid purpose." After several attempts over two months, the GAB has been unable to sustain—much less explain—any specific legal objection to public access to this discussion. The GAB's objection should be overruled.

c. Redaction referenced as "Page 72."

Plaintiffs' summary contains direct quotations of the document that is even more generally summarized at page 12 of Plaintiffs' current brief. As Plaintiffs explain, the GAB's direct involvement in plotting recusal strategies to benefit the prosecution, and in sharing intense political beliefs and commentary with the Special Prosecutor, shows the extent to which the GAB was directly involved in formulating strategy for courtroom work in John Doe II—a line of work appropriate for a line prosecutor in a district attorney's office, not for a purportedly neutral expert advisor on campaign finance law. Defendants once again rely on "materiality," an invalid legal objection. But further, there is no legal basis for the GAB's specific argument that the GAB

cannot be held responsible for actions of key GAB staff, merely because the Board did not vote on (or was kept in the dark about) the matter. The very fact that the GAB tries to hide this document from public view based on "materiality" illustrates the limitless elasticity of the argument. The summary (and underlying document) should come out, and it will play a major role in Plaintiffs' litigation of this case.

d. Redaction referenced as Pages 80 and 82

The summary of Page 80 contains a direct quote indicating the Special Prosecutor's criticism of the GAB Board and its experience in complex cases. It is invaluable as a first-hand account of the problems with the GAB's attempting to fund and then exert control over a criminal investigation already under the control of a special prosecutor with charging authority. Plaintiffs are entitled to prove that the GAB's transgressions are not merely technical violations of the statutes, but also materially wasted and mismanaged taxpayer dollars due to the Board's inexperience. The summary of Page 82 is a direct quote indicating a line investigator's criticism to Francis Schmitz of the aimless nature of the command structure, and is relevant as a ground-level example of the same issue identified on Page 80.

Defendants' objections to Pages 80 and 82 are devoid of content or argument, simply stating that each summary "raises the same kind of issues as discussed" in prior sections. However, those prior sections have nothing to do with the facts revealed in Pages 80 and 82. Defendants may be arguing "materiality," but if so, they make no attempt to explain why these facts are immaterial. Defendants' objections should be overruled.

e. Redaction referenced as Pages 142-144, and 145

This summary of two emails in which the two key GAB staff members criticized Francis Schmitz for making public comments about the investigation is relevant to show the extent to

which the GAB funded someone else's investigation, not its own. Further, it shows that the GAB had lost (or never had) control over a key issue, statutory GAB confidentiality, that it now claims places its staff in fear of criminal liability and prison time. It further demonstrates the extent to which the GAB funded and manned an investigation that was wholly criminal and had already been assigned to a Special Prosecutor who made decisions on his own. Defendants' objections are once again devoid of content or argument, allude vaguely to the presence of the "same kind of issues" as in earlier and unrelated redactions, and declare that Defendants "will not repeat the argument." However, there is nothing to repeat: Defendants never bothered to make the argument in the first place. Their objections should be overruled.

2. Exhibit A to Plaintiffs' Motion

a. Page 2

Page 2 is an important part of Plaintiffs' case that GAB unlawfully worked with the Milwaukee County prosecutors on John Doe II (and some aspects of John Doe I) long before the full board was informed in December 2012, and certainly long before the board voted to open an investigation. In the email, David Robles forwards a draft complaint, discusses his various Google email accounts, one for each John Doe investigation, and encourages GAB staffers to get their own. Plaintiffs would redact the names of subjects/targets attached to the Complaint as well as the actual Gmail addresses. Defendants confusingly claim that the document as a whole is "not related to" John Doe II, despite the fact that Robles clearly uses a code word for John Doe II and provides his special Google email address for John Doe II. The email was authenticated by a GAB witness, will be used on summary judgment and at trial, and should be seen, with one exception discussed below.

b. Pages with gmail addresses.

In order to speed resolution of these matters, and due to security concerns, Plaintiffs accede to redaction of the identifier portion of Google or other secret, non-state email addresses so long as it will be possible to refer at trial or on summary judgment to certain documents as having been sent or received through unsecure Google or private email accounts. Plaintiffs recognize that prosecutors and GAB staffers used this highly insecure method of storing and sharing sensitive investigative data and private and personal financial records, and may even be continuing to do so. They do not wish to allow unauthorized access to their own or their fellow targets' private information or documents.

c. Pages 8-17, 112-117, 118-129

These documents reference various candidates for the job of Special Prosecutor/investigator, and, as discussed *supra* at 15-17, n. 7-8, neither "materiality" nor any other legal principle supports their redaction.

d. Pages 21, 22, 42-45, 72, 80, 82, 105-106, 108-110, 111, 138-145, 159-160, 173, 181

Defendants attempt to meet their burden of proving the need to block public access by grouping these disparate documents, which cover a range of relevant topics. Addressing them as a block, Defendants simply state that all of the documents "raise the same kind of issues discussed" in prior sections of their memo, and declare that "there is no conceivably valid purpose to "present" the information to the Court. Again, because Plaintiffs have in fact filed and presented these documents with the Court at least twice, and strongly urge the Court and public to read these documents, this is simply Defendants' new way of phrasing their old materiality argument.

By way of example only, Plaintiffs direct the Court to the first two documents, Exhibit A, Pages 21 and 22. In Page 21, Shane Falk, copying Kevin Kennedy, Jonathan Becker, and Nate Judnic, discusses Supreme Court "recusal" strategy with Milwaukee County prosecutors. Again, this shows GAB staff actively working as line prosecutors and potential trial counsel in a John Doe challenge, not as campaign finance experts on the facts and law of the investigation. It proves an ongoing course of conduct in which top GAB employees simply manned the ranks of the prosecution team. In Page 22, Falk discusses with a Milwaukee County prosecutor a particular criminal litigation tactic meant to temporarily impair targets—another instance in which GAB staff act as de facto criminal prosecutors, not as campaign finance experts giving disinterested advice on the law and facts of a parallel investigation.

Plaintiffs could make (and would have made) a similar showing on each and every document if Defendants had simply met their burden of explaining how each document is immaterial. But Defendants never did. The previous sections of their brief to which they cite cover different documents, with different subjects, and different redactions. Perhaps Defendants found it prohibitively burdensome to properly present and support a motion *in limine* on each and every part of Plaintiffs' court filings—a task necessitated by Defendants' own insistence on their "presented in court" theory. But Defendants are the ones who are unnecessarily demanding secrecy. As this Court has held from the beginning, and as the Protective Order requires, the burden of supporting secrecy and of blocking public access to particular documents rests on the party asserting secrecy. Defendants have never made any attempt to meet that burden, either at the time of production, or when Plaintiffs filed their motion, or now, after this Court's most recent order giving them one last opportunity to make a specific objection to Plaintiffs' filings.

This strategy has achieved nothing but delay for the litigants, the Court, and the public at large. Enough is enough, and these documents should no longer be shielded from public view.

3. Exhibits B, C, and D to Plaintiffs' Motion

Defendants object that Exhibit B should remain sealed, but only because of the John Doe Secrecy Order. As discussed above, that no longer applies to Plaintiffs. This is a Plaintiff filing, and the exhibit should be unsealed.

Defendants object that Exhibit C, which shows that on June 27, 2014, GAB staff were editing the Special Prosecutor's John Doe filings to allow public release of John Doe materials in this case, has "no conceivably valid" purpose in this case. It is difficult to understand this argument. In Exhibit C, GAB's staff counsel, Shane Falk (copying GAB executives Kevin Kennedy, Jonathan Becker, and others) tells Special Prosecutor Schmitz to re-cast his characterization to Judge Peterson of the GAB-Milwaukee County relationship in order to support the GAB's litigation position in this case. Rather than having no conceivable purpose, this is a direct admission that is essential to Plaintiffs' position. For that reason, and also to show that the GAB, Francis Schmitz, and Milwaukee County prosecutors co-authored Judge Peterson's Use and Dissemination Order (addressed below as Exhibit D, and which must now become public), Plaintiffs have presented it to this Court. They have done so several times. That the GAB objects to this document as having not been "presented," and as being "immaterial," reveals that the GAB's standards are infinitely elastic when it comes to blocking public access to damaging documents. The document should be released; there is no legal basis for nondisclosure.

Defendants object only that Exhibit D is subject to the John Doe Secrecy Order. Again, because that order no longer applies to Plaintiffs, their filing should no longer be sealed, and Exhibit D should be released.

IV. CONCLUSION

For the reasons stated above, redactions should remain on very few of the documents addressed in Defendants' October 26 and October 30, 2015 Memos. John Doe secrecy no longer applies to Plaintiffs, except that subjects' identities must be protected. Plaintiffs further submit that now that the GAB confidentiality statute is finally isolated and Defendants have been required to explain why it applies to specific documents, it is clear that it serves only as a bar on the GAB. It cannot be used by the GAB to block Plaintiffs from making regular, public court filings, nor can it be used by the GAB to block public access to court filings, and therefore to frustrate public inquiry into its conduct. The GAB's latest inventions—first, "materiality," and now, the "presented in court" theory—are really the same concept, and neither one has any basis in the law. Plaintiffs respectfully suggest that it is time to take up important questions on the merits, that this should happen with maximum public access, and that the GAB's months-long, document-by-document rearguard action to maintain the cloak of secrecy surrounding its conduct should now meet its end.

Dated: November 6, 2015

Respectfully submitted,

FOX, O'NEILL & SHANNON, S.C.

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Certificate of Service

The undersigned hereby certifies that, on November 6, 2015, a complete copy of the foregoing was served via E-Mail and First Class U.S. Mail, postage prepaid, to the following counsel of record:

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