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May 18, 2011

**VIA MESSENGER**

Wisconsin Government Accountability Board  
212 East Washington Avenue, Third Floor  
Post Office Box 7984  
Madison, WI 53707-7984

Re: In Re Petition to Recall Senator Robert Wirch of the 22<sup>nd</sup> Senate District  
WGAB ID # 0600005

Dear Members of the Board:

We represent Erin M. Decker, the Petitioner in the above-referenced matter and write to object to the Government Accountability Board's ("the Board") receipt and consideration of numerous exhibits presented by Senator Wirch in connection with his reply filed with the Board on May 16, 2011. Pursuant to the challenge procedure provided by the Legislature, the Board may not consider these exhibits because they impermissibly represent late-filed challenges and/or supporting evidence.

Wisconsin's recall statute does not allow for the officer holder, in this case Senator Wirch, to provide new evidence in support of his or her challenge in the context of providing a reply to the recall petitioner's rebuttal. Wis. Stat. § 9.10(3)(b) clearly outlines an expedited challenge procedure. Pursuant to that procedure, Senator Wirch had ten days from the date the recall petition was offered for filing to present his challenge "specifying any alleged insufficiency" and to present supporting evidence in the form of affidavits or otherwise. Wis. Stat. § 9.10(3)(b) (emphasis added). The recall petitioner then had five days to rebut those challenges and had the opportunity, if she so desired, to supplement that rebuttal with affidavits and other supporting evidence. Following rebuttal, Senator Wirch had two days within which to reply "to any new matter raised in the rebuttal." *Id.* (emphasis added). Nowhere in this procedure is Senator Wirch permitted to use his reply as an opportunity to supplement his challenge with purported evidence that was not submitted with his challenge in the first instance. With many of the exhibits Senator Wirch has submitted with his reply, that is exactly what he has done.

Specifically, Exhibit Nos. 64 - 73 include affidavits and other evidence that do not address any new matter raised in the rebuttal.<sup>1</sup> Exhibit 74-22, which is presented in the form of an affidavit from Mr. Pfohl and which purports to provide information purely in rebuttal to Mr. Hogan's Affidavit, includes numerous exhibits which impermissibly introduce new evidence that is not responsive to new matters raised in the rebuttal. While Exhibits SD22HrA, SD22HrB and

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<sup>1</sup> Exhibits 68-69 purport to relate to Mr. Megie's place of residence and Exhibit 70 purports to relate Mr. Salway's place of residence. Mr. Megie's and Mr. Salway's respective affidavits simply confirmed their respective places of residence as certified on the Recall Petition. Exhibits 68-70 of Senator Wirch's reply attach unsubstantiated, unexplained data that do not address any new matter raised in the rebuttal.

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SD22HrE to Mr. Pfohl's Affidavit are appropriately presented as a reply to the rebuttal, the remaining exhibits (Exhibits SD22HrC, SD22HrD and SD22HrF) present new information and, in certain instances, include new challenges to signatures for the first time on reply. Those exhibits do not respond to new matters raised in the rebuttal, but rather supplement and expand Senator Wirch's original challenge. Exhibit 75 likewise represents entirely new information that is purportedly offered "to provide faster analysis of given circulators." In fact, Exhibit 75 presents for the first time challenges to nearly 6,000 signatures.

The Board has no authority to consider these late-filed challenges and, in the process, reward Senator Wirch's effort to circumvent the clear challenge procedure outlined in the recall statute. His ploy of waiting until after the rebuttal has been submitted to introduce new challenge "evidence," which the recall petitioner has no opportunity to rebut, is unquestionably outside the bounds of the challenge procedure. Since Senator Wirch has offered a substantial amount of new evidence and new signature challenges for the first time with his reply, the recall petitioner has had and will have no opportunity to evaluate and rebut this new evidence.

The procedures and deadlines outlined in Wis. Stats. § 9.10(3)(b) are significant in that the Legislature chose to dictate a very short timeline to provide for expeditious review of recall petitions and the expeditious scheduling of recall elections in instances where recall petitions are deemed sufficient, subject to court-ordered extensions in appropriate circumstances. In numerous hearings before the Dane County Circuit Court in this and related recall matters, Senator Wirch's counsel not only acknowledged that § 9.10 allows very short time periods to present and rebut challenges, but he repeatedly urged the Court to require the parties to abide by the statutory timeline and not thwart the Legislature's goal of expeditious review of recall petitions.

In April, the Board sought and was granted extensions to its 31-day time period for determining the sufficiency of the petition offered for filing for the recall of Senator Wirch. The Court's order issued in response to the Board's request extended the deadlines for filing Senator Wirch's challenge, the recall petitioner's rebuttal and Senator Wirch's reply by allowing those deadlines to be counted on the basis of business days and not calendar days. Senator Wirch did not oppose these minor extensions and he never sought an additional extension of these deadlines.

By allowing the parties to use business days to calculate filing deadlines, the Court left intact the fundamental structure of the procedure outlined by the Legislature, which is the filing of a challenge, followed by a rebuttal and then a reply. To allow Senator Wirch to introduce new challenge data and to challenge new signatures for the first time in the context of his reply would fundamentally alter the procedure outlined in § 9.10 and place the recall petitioner at the distinct disadvantage of being unable to respond meaningfully to the new challenges offered for the first time on reply. The Board must disregard Senator Wirch's efforts to supplement the record with information he may have wished he had provided initially, because neither the recall statute nor the Board's own regulations allow for the supplementation of evidence after the challenge has

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been filed except as necessary and appropriate to reply to new matters raised in the recall petitioner's rebuttal. If the Board allows parties to continue to submit evidence after the statutory deadlines, those deadlines will have no meaning and the Board will have exceeded its authority and rewritten Wis. Stat. § 9.10(3)(b). The Board must disregard all affidavits and other purported evidence that Senator Wirch submitted with his reply except for attachments SD22HrA, SD22HrB and SD22HrE to Exhibit 74-22 (and related affidavit paragraphs, to the extent those paragraphs actually reply to new matters in the rebuttal and do not introduce new challenges) that actually reply to the recall petitioner's rebuttal.

We thank you for your consideration of this important issue and look forward to your consideration of the recall petition in this matter at your special meeting on May 31, 2011.

Sincerely,

**MICHAEL BEST & FRIEDRICH LLP**



Eric M. McLeod

EMM:sas

cc: Jeremy Levinson, Esq. (*via e-mail & mail*)

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