

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the June 8, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Nathaniel E. Robinson
Elections Division Administrator
Government Accountability Board

Prepared and Presented by:

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SUBJECT: Recall Petition Challenge: Senator Robert Wirsch—Individual Signatures

I. Introduction:

Staff has prepared this Memorandum to summarize staff's review of the recall petition and any challenges, rebuttal, or reply thereto.

This Memorandum is limited to an analysis of challenges to individual signatures, while an accompanying Memorandum will address Senator Wirsch's circulator residence and fraud challenges and the Brief of Amicus Curiae Kennedy Enterprises, LLC and any replies submitted thereto.

II. Summary of Verified Challenge of Individual Signatures:

A. Senator Wirsch's Verified Challenge

Senator Wirsch's Verified Challenge (paragraph 12) presents the following challenges to individual signatures:

- a. At least 132 signatories to the recall petition did not date their signatures, dated their signatures outside the purported circulation period, or signed the recall petition subsequent to the respective circulator's certification period. §9.10(2)(e)1-3, Wis. Stats.

- b. The residency of at least 482 signatories to the recall petition cannot be determined by the address given. §9.10(2)(e)4, Wis. Stats.
- c. At least 523 signatories to the recall petition reside outside of the 22nd Senate District. §9.10(2)(e)5, Wis. Stats.
- d. At least 31 signatories to the recall election are not qualified electors, as their names appear on the ineligible voter list provided by the G.A.B. §9.10(2)(e)8, Wis. Stats.
- e. At least 114 signatories signed the recall petition twice. §9.10(2)(i), Wis. Stats.

Senator Wirch's Verified Challenge (paragraphs 5-11,) and as further supported by Exhibit 63-22, present the following additional challenges to individual signatures:

- f. At least 2,407 signatures appear on recall petition pages with circulator address issues, such as two different municipalities listed for the circulator in different handwriting and incomplete circulator addresses.
- g. At least 133 signatures are fake, circulator forgery, or signer forgery.
- h. At least 221 signatories claim not to have signed the recall petition (name forged) or were tricked into signing the recall petition.

B. Memorandum In Support of Challenge to Individual Signatures

In Section III of the Memorandum in Support of Senator Wirch Challenge to Petitions, Senator Wirch argues that the recall petitions are rife with disqualifying omissions, inaccuracies, and other fatal defects. Senator Wirch summarizes the above challenges and refers to the underlying detail set forth in Exhibit 63-22. In Senator Wirch's Reply in Support of His Challenge to the Petition, Senator Wirch primarily focuses on his circulator residence and fraud allegations which are addressed in the accompanying Memorandum. However, the reply also addresses the correcting affidavits provided by the Petitioner, arguing that many of them are invalid for evidentiary reasons.

The "Memorandum in Support of Senator Wirch Challenge to Petitions," "Senator Wirch's Reply in Support of His Challenge to the Petition," and Exhibit 63-12 can be found on the G.A.B. website at: <http://gab.wi.gov/publications/other/recall-challenge-documents>.

C. Petitioner's Rebuttal to Senator Wirch's Challenge

In the Petitioner's Rebuttal Memorandum in Response to Senator Robert Wirch's Challenge, the Petitioner argues that pursuant to §9.10(2)(g), Wis. Stats., Senator Wirch has failed to meet his burden of proving that certain individual signatures are invalid and that other challenges involve technical deficiencies which are corrected by numerous affidavits filed by the Petitioner.

As to the challenges of individual signatures, the Petitioner notes that the majority of signatures Senator Wirch challenges are reflected in a series of spreadsheet printouts that were filed with his Verified Challenge as Exhibit 63-22. Further, the Petitioner argues that Senator Wirch did not provide any affidavit that established what Exhibit 63-22 represents, how the information included in the exhibit was selected or what the purported challenges are intended to represent. While acknowledging that Senator Wirch does describe various categories of

challenged signatures in his Verified Challenge, particularly in ¶ 12, the Petitioner argues that the G.A.B. should reject all the purported challenges reflected in Exhibit 63-22 because Senator Wirch failed to demonstrate by affidavit or other supporting evidence that the statutory requirements were not met by the Petitioner. The Petitioner's assertion regarding this general rejection of all of the challenges is addressed and analyzed in Section II(D) of this Memorandum, below.

In Sections I-VIII of Petitioner's Rebuttal Memorandum in Response to Senator Robert Wirch's Challenge, the Petitioner provides argument supported by affidavits in response to some of Senator Wirch's individual signature challenges.

Petitioner's "Rebuttal Memorandum in Response to Senator Robert Wirch's Challenge," the "Affidavit of John W. Hogan," and affidavits numbered 1-4 can be found on the G.A.B. website at: <http://gab.wi.gov/publications/other/recall-challenge-documents>.

D. Analysis Regarding Form of Challenge:

The G.A.B. *shall* review a verified challenge to a recall petition, if it is made prior to certification. §9.10(2)(f), Wis. Stats. (emphasis added.) See also §§2.07(1) and 2.11(1), Wis. Adm. Code. Furthermore, the G.A.B. "*shall review any evidence* offered by the parties when reviewing a complaint challenging the sufficiency" of a petition. §§2.07(4) and 2.11(1), Wis. Adm. Code. Senator Wirch bears the burden of proof on challenges and that burden is clear and convincing evidence of an insufficiency. §9.10(2)(g), Wis. Stats. See also GAB §§2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code. "Any challenge to the validity of signatures on the petition shall be presented by affidavit *or other supporting evidence* demonstrating a failure to comply with the statutory requirements." §9.10(2)(h), Wis. Stats. (emphasis added.) See also §§2.07(2)(a) and 2.11(1), Wis. Adm. Code. If the officeholder establishes the information on the petition is insufficient, the burden is on the petitioner to establish its sufficiency. §§2.07(3)(a) and 2.11(1), Wis. Adm. Code. Finally, the G.A.B. shall decide the challenge with or without a hearing. §§2.07(2)(b) and 2.11(1), Wis. Adm. Code.

1. Verified Complaint and Affidavit

In the legal context, "verification" means "a formal declaration made in the presence of an authorized officer, such as a notary public, by which ones swears to the truth of the statements in the document." *Black's Law Dictionary*, Seventh Edition, p. 1556, Garner, Bryan A., West Group, (1999). In the legal context, "affidavit" means "a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Black's Law Dictionary*, Seventh Edition, p. 58, Garner, Bryan A., West Group, (1999).

In Wisconsin, a verified complaint, affidavit of the facts, or sworn testimony are often permitted to meet a burden of proof. See e.g. §799.22(3), Wis. Stats. (Upon a defendant's failure to appear in small claims court, the plaintiff may file a verified complaint, or an affidavit of the facts, or may offer sworn testimony or other evidence to the judge.)

The G.A.B. is specifically charged with the requirement to review any verified challenge to a recall petition and the G.A.B. "*shall review any evidence*" offered by the parties when reviewing a complaint challenged the sufficiency of a petition. The statutes permit any

challenge to the validity of signatures to be presented by affidavit *or other supporting evidence*. In the instant matter, Senator Wirch filed a “Verified Challenge,” to which he swore upon oath that he read the written challenge and that the allegations are true and correct based on his personal knowledge and, as to those allegations stated on information and belief, that he believes them to be true. Essentially, the “Verified Challenge” filed by Senator Wirch meets the definition of an “affidavit.”

The challenges asserted by Senator Wirch in his Verified Complaint are set forth in Section I(A) above, which does allege facts consistent with the summary of challenges found in Exhibit 63-22. Along with this Verified Challenge, Senator Wirch provided a Memorandum in Support and Exhibits 1-63, as well as a Reply and additional exhibits. The Memorandum in Support of Senator Wirch’s Challenge to Petitions and Senator Wirch’s Reply both specifically reference and provide explanation of Exhibit 63-22, among many other exhibits.

In the context of the G.A.B.’s charge to review *any evidence and other supporting evidence*, the Board should not exclude all individual challenges due to the failure of Senator Wirch to submit an affidavit in addition to his Verified Challenge. In fact, looking back at 5 of the previous 6 recall challenges filed with the Board (one only presented a legal challenge with no challenges to individual signatures,) the affidavits provided mirrored the verified challenge documents. For example, in the “Written Challenge of Senator Alberta Darling,” the following appears:

10. On information and belief, the Recall Petition includes the following irregularities, which are supported by the Affidavit of John W. Hogan, attached hereto:

...

f. At least 3,462 signatories to the Recall Petition reside outside of the 8th Senate District. Pursuant to Wis. Stat. §9.10(2)(e)5., these signatures may not be counted.

In the “Affidavit of John W. Hogan,” the following appears:

4. In connection with my duties at CERS, I have reviewed the numerous pages of the Recall Petition and have identified the following irregularities:

...

g. Based on my review of the specific addresses listed, at least 3,462 signatories reside outside the 8th Senate District. Details regarding these signatories, including their respective names and Recall Petition page numbers, are described on the attached Exhibit E.

Like Senator Wirch’s Verified Challenge, Senator Darling also swore under oath that her challenge and allegations were true and correct based on her personal knowledge and as to those allegations stated on information and believe, that she believed them to be true. The

“Affidavit of John W. Hogan” simply provides upon “being first duly sworn” and then statements similar to the above followed. The Board specifically has the statutory discretion to consider an affidavit “or any other supporting evidence” demonstrating a failure to comply with statutory requirements. The Board may determine that generally a verified and sworn complaint submitted with exhibits is sufficient “other supporting evidence” to assert a valid challenge to a recall petition, subject to a determination that such other supporting evidence meets the challenger’s clear and convincing evidentiary burden.

2. Clear and Convincing Burden

Senator Wirth bears the burden of proof on challenges and that burden is clear and convincing evidence of an insufficiency. §9.10(2)(g), Wis. Stats. See also GAB §§2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code. In Wisconsin, this middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. *Kruse v. Horlamus Industires, Inc.*, 130 Wis.2d 357, 363, 387 N.W.2d 64 (Wis. 1986) (citing: *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980)). The Supreme Court has generally required the middle burden of proof “[i]n the class of cases involving fraud, of which undue influence is a specie, gross negligence, and civil actions involving criminal acts.” *Id.* (citing: *Kuehn v. Kuehn*, 11 Wis.2d 15, 26, 104 N.W.2d 138 (1960)). In general, “clear preponderance” has only been considered substantially equivalent to “clear, satisfactory and convincing evidence” where the civil case involved a crime, fraud or gross negligence. *Id.* (citing e.g.: *Trzebietowski v. Jereski*, 159 Wis. 190, 149 N.W. 743 (1914) (civil case involving a crime), and *Hafemann v. Seymer*, 191 Wis. 174, 210 N.W. 373 (1926) (gross negligence), both cited in *Kuehn*, supra, 11 Wis.2d at 27, 104 N.W.2d 138.)

In addition, many civil jury instructions that relate to the middle burden of proof read: “to a reasonable certainty by [or “from”] evidence that [or “which”] is clear, satisfactory, and convincing.” *Nommensen v. St. Mary’s Medical Center*, 629 N.W.2d 301, FN 4 (Wis. 2001) (citing: Wis JI—Civil 205 (Burden of Proof: Middle); 2004 (Assault); 2005 (Battery (Physical Harm)); 2151 (Federal Civil Rights Actions: §1983 Actions); 2500 (Defamation); 2511 (Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice)); 2520 (Defamation: Punitive Damages); 2760 (Bad Faith by Insurance Company (Excess Verdict Case)) (also contains an instruction on the lower burden); 2780 (Intentional Interference with Contractual Relationship) (also contains an instruction on the lower burden); 2800 (Conspiracy: Defined); 2802 (Conspiracy: Proof of Membership); 2804 (Conspiracy: Indirect Proof); 2810 (Conspiracy: Overt Acts); 3074 (Estoppel) (withdrawn instruction; language contained in note for trial judges); 7060 (Protective Placement); 7070 (Commitment of an Alcoholic)). Some instructions state the middle burden in a different but substantially similar manner, though also employing the phrase “reasonable certainty.” *Id.* (citing: Wis JI--Civil 2155 (Federal Civil Rights: Excessive Force in Arrest (In Maintaining Jail Security)); 7050 (Mentally Ill)).

The Wisconsin Civil Jury Instruction #205 provides in part:

The burden is to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you . . . [of] the answer because of its greater weight and clear and convincing power.

“Reasonable certainty” means that you are persuaded upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

E. Conclusion, Recommendation, Proposed Motion:

Since the Board may decide a challenge to a recall petition with or without a hearing, the Administrative Code presumes most evidence will be received in a form other than sworn testimony subject to cross-examination. The Board is required by the Administrative Code to “review any evidence” offered by the parties and the parties may submit an “affidavit *or other supporting evidence*.” See §§2.07(4) and 2.11(1), Wis. Adm. Code; See also §9.10(2)(h), Wis. Stats. and §§2.07(2)(a) and 2.11(1), Wis. Adm. Code. In this context, the rejection of all of the challenges summarized in Exhibit 63-22 as a whole for failure to demonstrate by affidavit that the statutory requirements were not met by petitioners would appear to contradict the procedures outlined in the Statutes and the Administrative Code.

Recommendation:

G.A.B. staff recommends that the Board find generally that exhibits describing a challenge that are submitted with a Verified Challenge may be sufficient proof to meet the challenger’s burden. In other words, an actual affidavit may not always be necessary and a verified challenge coupled with an exhibit may suffice. Therefore, Petitioner’s challenge to the receipt and consideration of the whole of Exhibit 63-22 should be denied, subject to specific circumstances where Senator Wirsch is unable to meet the clear and convincing burden of proof.

Proposed Motion:

MOTION: Petitioner’s challenge to the receipt and consideration of the whole of Exhibit 63-22 is denied, subject to application of the clear and convincing burden of proof to specific challenges contained within Exhibit 63-22.

III. Factual Challenges of Individual Signatures And Recommendations

A total of 13,537 valid recall petition signatures were required for a certification of sufficiency to recall Senator Wirsch. Following staff’s first and second reviews of the recall petition, a total of 17,544 valid signatures were verified.

Staff has prepared exhibits that follow this Memorandum. Following the staff’s original facial review of the petition, signatures identified by page and line numbers in staff’s exhibit were

reviewed more thoroughly as a result of the challenges, rebuttal and reply. If specific challenged signatures are not shaded in staff's exhibit, staff had already struck the signatures after completing its first and second reviews of the petition and for the same reason as the challenge. After reviewing the challenges and all affidavits, rebuttal and all affidavits, and reply and affidavits (except as otherwise specifically set forth herein), staff makes the following report and recommendations.

For any signatures shaded in red, staff recommends that the Board affirm the challenge and strike the signatures, reducing staff's verified number of signatures in the same amount.

For any signatures shaded in yellow, staff recommends that the Board deny the challenge for the reasons stated. (If the Board does not adopt staff's recommendation and affirms a challenge to any of the signatures shaded in yellow, those signatures should be struck and staff's verified number of signatures must be reduced by the same amount.)

For any signatures shaded in green, staff recommends that the Board deny the challenge as the signatures were already struck after completing the first and second reviews of the petition, but for a different reason than the challenge.

A. Address Challenges:

Challenges to 482 individual signatures for failure to meet statutory requirements regarding a signer's address are set forth in Exhibit 63-22. Pursuant to the Verified Challenge, these challenges are based upon §9.10(2)(e)4., Wis. Stats., which states that an individual signature on a petition sheet may not be counted if the residency of the signer of the petition sheet cannot be determined by the address given. Staff's review of these challenges is set forth in the attached Exhibit A.

Based upon the challenges and staff's reviews, staff recommends that the Board affirm the challenges and strike the 53 signatures identified in staff's exhibit, shaded in red.

After the first and second review and considering these challenges, staff recommends that the Board accept the 292 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges.

In the first and second review by staff, 7 challenged signatures shaded in green were already struck by staff, but for different reasons than the challenge. Therefore, no change in staff's verified total is warranted.

Recommendation—Reduce Verified Total by 53.

B. Circulator Address Challenges:

Challenges to 2,407 individual signatures for failure to meet statutory requirements regarding a circulator's certificate of sufficiency are set forth in Exhibit 63-22. Staff's review of these challenges is set forth in the attached Exhibit B.

The challenger alleges that the certificates of circulators negatively impact 2,351 individual signatures because there are two different municipalities listed in different handwriting in

the certificate of circulator. In addition, the challenger alleges that the certificates of circulators negatively impact 35 individual signatures because there is an incomplete circulator address in the certificate of circulator and another 21 individual signatures because there is a bad circulator address.

Based upon the challenges and staff's reviews, staff recommends that the Board affirm the challenges and strike the 18 signatures identified in staff's exhibit, shaded in red.

For the purposes of this Memorandum only, staff has recommended denying the challenges to 2,307 of these individual signatures because any information on a recall petition is entitled to a presumption of validity pursuant to §§2.05(4) and 2.09(1), Wis. Adm. Code. Here, the Board could find that the officeholder failed to rebut the presumption of validity and meet his clear and convincing burden of proof pursuant to §9.10(2)(g), Wis. Stats. and §§2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code., because he has not presented any affidavits to support his allegations that someone other than the circulator completed the certificate of circulator or that certain circulators' residences cannot be determined from information on the petition page.

After the first and second review and considering these challenges, staff recommends that the Board accept the 2,307 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges, subject to review of these signatures and involved petition pages pursuant to the circulator address and fraud allegations discussed in the accompanying Memorandum.

In the first and second review by staff, 70 challenged signatures shaded in green were already struck by staff, but for different reasons than the challenge. Therefore, no change in staff's verified total is warranted.

Recommendation—Reduce Verified Total by 18.

C. Signatures from Persons Outside the 22nd Senate District:

Challenges to 523 individual signatures from persons outside the 22nd Senate District are set forth in Exhibit 63-22. Staff's review of these challenges is set forth in the attached Exhibit C.

The Petitioner argues that the Board should reject Senator Wirch's challenge to signatures of people allegedly residing outside the 22nd Senate District. The Petitioner argues that Senator Wirch has not provided any support for the challenge other than a "67-page" list of addresses (in fact, it is only a 16-page list.) The Petitioner cites to §2.07(5), Wis. Adm. Code, for the proposition that "where it is alleged that the signer . . . does not reside in the district . . . the challenger may attempt to establish the geographical location of an address . . . by providing district maps, or by providing a statement from a postmaster or other public official." Petitioner concludes with the request that since Senator Wirch has failed to provide any evidence to support this challenge, he has not met his burden of proof and the Board should reject all such challenges.

Similar to Senator Wirch's challenge to signatories residing outside the 22nd Senate District, Senator Darling simply submitted a spreadsheet identifying the signatories

residing outside the 8th Senate District by name, address, page, and line number. The G.A.B. accepted this evidence and in the context of its duty to review the challenge, performed additional address verifications on the challenged signatories, ultimately striking 2,468 signatures based upon the challenge, rebuttal and G.A.B. staff's address verifications. The G.A.B. did not require any of the 5 previous Republican Senator challengers to submit "district maps, or providing a statement from a postmaster or other public official" pursuant to §2.07(5), Wis. Adm. Code. In fact, that section of the administrative code is permissive and does not require supporting documentation. Since the Board accepted previous challenges presented in nearly identical fashion, staff recommends that the Board receive the evidence of the challenge, including staff's review and verification of addresses to confirm certain individual challenges thus meeting the clear and convincing burden, and make the recommended determinations as follows.

Based upon the challenges and staff's reviews, staff recommends that the Board affirm the challenges and strike the 155 signatures identified in staff's exhibit, shaded in red.

After the first and second review and considering these challenges, staff recommends that the Board accept the 77 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges.

In the first and second review by staff, 19 challenged signatures shaded in green were already struck by staff, but for a different reason than the challenges. Therefore, no change in staff's verified total is warranted.

Recommendation—Reduce Verified Total by 155

D. Duplicate Signatures:

Challenges to 114 individual signatures that have a duplicate (totaling 228) are set forth in Exhibit 63-22. Staff's review of these challenges is set forth in the attached Exhibit D. During the first and second reviews, staff does not examine the recall petition for duplicate signatures. Pursuant to statute and administrative code, the first signature should be included in the total and the Board's approval of the yellow-shaded signatures counts one instance of each.

Based upon the challenges and staff's reviews, staff recommends that the Board affirm the challenges and strike the 102 signatures identified in staff's exhibit, shaded in red.

After the first and second review and considering these challenges, staff recommends that the Board accept the 8 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges, subject to review of these signatures and involved petition pages pursuant to the circulator address and fraud allegations discussed in the accompanying Memorandum.

In the first and second review by staff, 4 challenged signatures shaded in green were already struck by staff, but for a different reason than the challenges. Therefore, no change in staff's verified total is warranted.

Recommendation—Reduce Verified Total by 102.

E. Signatures from Unqualified Electors:

Challenges to 32 individual signatures from unqualified electors are set forth in Exhibits 1 and 63-22. Staff's review of these challenges are set forth in the attached Exhibits E and E Supp. During the first and second reviews, staff does not examine the elector qualification and eligibility of persons having signed the recall petition.

Based upon the challenges and staff's reviews, staff recommends that the Board affirm the challenges and strike the 30 signatures identified in staff's exhibits, shaded in red.

In the first and second review by staff, 2 challenged signatures shaded in green were already struck by staff, but for a different reason than the challenges. Therefore, no change in staff's verified total is warranted.

Recommendation—Reduce Verified Total by 30.

F. Fakes and Forgeries:

Challenges to 133 individual signatures for fake signatures, circulator forgery, and signer forgery are set forth in Exhibit 63-22. Staff's review of these challenges is set forth in the attached Exhibit F.

The challenger alleges that there are 4 fake signatures, 126 cases of individual signer forgery, and 3 cases of circulator forgery of individual signatures.

For the purposes of this Memorandum only, staff has recommended denying the challenges to 126 of these individual signatures because any information on a recall petition is entitled to a presumption of validity pursuant to §§2.05(4) and 2.09(1), Wis. Adm. Code. Here, the Board could find that the officeholder failed to rebut the presumption of validity and meet his clear and convincing burden of proof pursuant to §9.10(2)(g), Wis. Stats. and §§2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code., because he has not presented any affidavits to support his allegations that 4 signatures are fake and someone other than the purported signator signed the petition page.

After the first and second review and considering these challenges, staff recommends that the Board accept the 126 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges, subject to review of these signatures and involved petition pages pursuant to the circulator address and fraud allegations discussed in the accompanying Memorandum.

In the first and second review by staff, 7 challenged signatures shaded in green were already struck by staff, but for different reasons than the challenge. Therefore, no change in staff's verified total is warranted.

Recommendation—No Change

G. Phone Challenges: Affidavits of Misrepresentation of Purpose or Not Signer

Challenges to 221 individual signatures for failure to meet statutory requirements regarding certification of circulator issues arising from misrepresenting the purpose of the recall

petition or persons purported to have signed the recall petition but claim not to are set forth in Exhibit 63-22 and are supplemented by various individual affidavits identified in staff's review of these challenges as set forth in the attached Exhibit G.

Analysis:

Section 9.10(2)(m), Wis. Stats., states that no signature may be stricken on the basis that the elector was not aware of the purpose of the petition, unless the purpose was misrepresented by the circulator. Senator Wirch bears the burden of proof on this challenge and that burden is clear and convincing evidence of an insufficiency. §9.10(2)(g), Wis. Stats. See also GAB §§2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code. The Board is required by the Administrative Code to "review any evidence" offered by the parties and the parties may submit an "affidavit *or other supporting evidence.*" See §§2.07(4) and 2.11(1), Wis. Adm. Code; See also §9.10(2)(h), Wis. Stats. and §§2.07(2)(a) and 2.11(1), Wis. Adm. Code. Any information which appears on a petition is entitled to a presumption of validity. §§2.05(4) and 2.09(1), Wis. Adm. Code.

Senator Wirch challenges individual signatures based upon two reasons, either the signer claimed not to have signed the petition (40) or the signer was tricked into signing the petition as a result of misrepresentation by the circulator (181.) Staff reviewed the affidavits submitted with Senator Wirch's challenge and was able to verify 2 individuals claiming via affidavit that they never signed the recall petition and 20 individuals claiming via affidavit to have had the purpose of the petition misrepresented to them at the time of signing. These challenges likely arose from the telephone survey conducted on behalf of Senator Wirch, as documented in Exhibits 59 and 75.

In the instant matter, Senator Wirch has presented two forms of evidence regarding circulators' misrepresentation of the purpose of the petition and the fact that individual alleged signators claimed not to have signed the petition. Senator Wirch provides a number of actual affidavits from signators indicating in effect that the signator claims to have never signed the petition, or that the circulator misrepresented the purpose of the petition which improperly induced the signators to sign. In addition, Senator Wirch offers the results of a phone survey performed by PF Data, as explained further in Exhibits 59 and 75.

Senator Wirch has argued that the 10-day period within which to provide an "affidavit or other supporting evidence" was too short to obtain an actual affidavit from every person contacted by the phone survey. Since the Board must "review any evidence" offered by the parties and since the parties may offer "other supporting evidence" of a challenge, the Board could find that the results of the phone survey as summarized in the affidavits of Michael L. Pfohl (Exhibits 59 and 75) are sufficient to rebut the administrative presumption of validity, thereby shifting the burden to the Petitioner. If the Petitioner does not provide additional evidence rehabilitating, explaining the basis for the signatures, or responding to signatures in question, then the Board could consider striking additional individual signatures as set forth in staff's attached Exhibit G and shaded in yellow. In fact, staff was unable to find a single affidavit or any other evidence from the Petitioner attempting to rehabilitate, explain the basis for the signatures, or respond to signatures in question as a result of the affidavits and telephonic survey.

However, the Petitioner raises a legal objection to Senator Wirsch's introduction of additional affidavits and evidence with his reply to the Petitioner's rebuttal of the challenges. By letter dated May 18, 2011, the Petitioner asserts that Exhibit Nos. 64-73 which do not address any new matter raised in the rebuttal, impermissibly introduces new evidence and signature challenges that should not be considered by the Board. However, the Petitioner does concede that portions of Exhibit 74-22 (SD22HrA, SD22HrB, and SD22HrE) and related affidavit paragraphs are permissible in that they respond to new matters raised in the rebuttal.

In making this legal objection, the Petitioner relies upon the deadlines for challenges, rebuttals and replies set forth in §9.10(3)(b), Wis. Stats. The challenger has only until 10 days after the petition is offered for filing to file challenges. A rebuttal from the petitioner may be filed within 5 days after the challenge is filed. Lastly, a reply to the rebuttal may be filed within 2 days after the rebuttal is filed. Furthermore, the Petitioner argues §9.10(3)(b), Wis. Stats., specifically provides that any reply is restricted to "any new matter raised in the rebuttal." The Petitioner points out that the Legislature chose to dictate very short timelines for review of recall petitions so as to provide for an expeditious review, subject to court-ordered extensions in appropriate circumstances. The Petitioner reminds the Board that the G.A.B. did request an extension of the 31-day time period for determining sufficiency; however, during this Court hearing, Senator Wirsch's attorney did not move to significantly expand the time for filing challenges.

Exhibit 75 (detailed summary of the phone survey further supporting Exhibits 59 and 63-22 in response to the Petitioner's rebuttal,) is not necessarily dispositive of Senator Wirsch's challenge. In fact, Exhibit 59 as supplemented by Exhibit 63-22, provides the initial basis for this challenge and does itemize all signatures challenged. Exhibit 75 supplements the prior exhibits, but the challenges were actually raised in the initial challenge documents. Furthermore, there are only two additional affidavits in Exhibit 64 from individuals claiming that the circulator misrepresented the purpose of the petition that staff considered (which is identified in red in staff's attached Exhibit G—Richard Prestidge and Steve Skau) because it was included as a challenged signature in Exhibit 63-22.

For the purpose of this Memorandum, staff is recommending striking only those signatures for which actual un rebutted affidavits have been received, leaving the Board to determine whether further signatures should be struck based solely upon the telephonic survey and affidavits in Exhibits 59, 63-22 and 75, as well as whether Exhibits 64 and 75 should be considered over Petitioner's objection. Please note that an accompanying Memorandum will address whether this misrepresentation or alleged forgery is fraud such that additional signatures should be struck.

Based upon the challenges, rebuttal, reply, affidavits, and staff's reviews, staff recommends that the Board affirm the challenges and strike the 22 signatures identified in staff's exhibit, shaded in red.

After the first and second review and considering these challenges, staff recommends that the Board accept the 194 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges, subject to review of these individual signatures after a ruling to consider whether Exhibits 59, 63-22, and 75 constitute clear and convincing evidence, as well as a

review of signatures and involved petition pages pursuant to the circulator address and fraud allegations discussed in the accompanying Memorandum.

In the first and second review by staff, 5 challenged signatures shaded in green were already struck by staff, but for different reasons than the challenge. Therefore, no change in staff's verified total is warranted.

Recommendation—Reduce Verified Total by 22.

H. Signer Date Challenges:

Challenges to 132 individual signatures for failure to provide a date are set forth in Exhibit 63-22. Staff's review of these challenges are set forth in the attached Exhibit H.

Based upon the challenges and staff's reviews, staff recommends that the Board affirm the challenges and strike the 26 signatures identified in staff's exhibit, shaded in red.

After the first and second review and considering these challenges, staff recommends that the Board accept the 12 signatures identified in staff's exhibit, shaded in yellow, and deny the challenges.

Recommendation—Reduce Verified Total by 26.

IV. Correcting Affidavits—Rehabilitated Signatures

A petitioner may file affidavits or other proof correcting insufficiencies, including but not limited to: failure of the circulator to sign the certification of circulator and failure of the circulator to include all necessary information. §9.10(2)(r)4-5., Wis. Stats. Pursuant to §2.09(1), Wis. Adm. Code, the standards established in §2.05, Wis. Adm. Code, apply to the treatment and sufficiency of recall petitions. Furthermore, §2.05(4), Wis. Adm. Code, permits correction of certain errors on the recall petition committed by either a signer or a circulator. The corrections may occur by an affidavit of the circulator or the signer, but the person giving the correcting affidavit "shall have personal knowledge of the correct information."

In the instant matter, the Petitioner has submitted 4 correcting affidavits with its rebuttal, which attempt to correct circulator and signer errors. Staff has reviewed each correcting affidavit and recommends the Board rehabilitate no individual signatures for the reasons stated in the attached Exhibit I, essentially because staff already counted the signatures on the pages shaded in green. Staff recommends that the Board deny rehabilitation for 23 individual signatures for the reasons in the attached Exhibit K, including lack of firsthand knowledge and failure to identify specific petition pages.

Recommendation—No Change.

V. Multiple Challenge Reconciliation

As a result of the numerous challenges, occasionally a single signature has been challenged for multiple reasons. In Section III(A-H) above, staff has recommended that the Board take action on two or more separate challenges for the same signature. Staff has documented one instance

of multiple challenges for a single signature and the result can be found in the attached Exhibit J. Essentially, on 1 occasion, a signature was struck multiple times by separate challenges. A signature can only be struck once and therefore, the verified total needs to be increased by 1 to remedy the excess reduction from the verified totals based on challenges.

Summary of Recommendations:

Staff recommends that the Board affirm or deny the challenges to individual signatures as set forth more fully in the motions below, but subject to the Board's consideration of additional challenges for misrepresentation or because the purported signer did not sign, based upon the telephone survey.

Staff recommends that the Board affirm challenges to 406 individual signatures, deny challenges to 3,016 individual signatures, deny rehabilitation of 23 individual signatures, reconcile for multiple challenges for a single signature and increase the verified total by 1, all subject to review of signatures and involved petition pages pursuant to the circulator address and fraud allegations discussed in the accompanying Memorandum.

Proposed Motion:

MOTION: Affirm challenges to 406 individual signatures, deny challenges to 3,016 individual signatures, deny rehabilitation of 23 individual signatures, reconcile for multiple challenges for a single signature and increase the verified total by 1, of the recall petition against Senator Wirch and for the reasons stated in staff's exhibits, leaving 17,139 valid verified signatures, but all subject to review of signatures and involved petition pages pursuant to the circulator address and fraud allegations discussed in the accompanying Memorandum.