UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RODNEY JENSEN et al

Plaintiffs,

Case No. 18-CV-46

vs.

VILLAGE OF MOUNT PLEASANT et al,

Defendants.

MOTION AND BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER AND CONSOLIDATION

Motion and Overview

Plaintiffs hereby move and request that Racine County Case 18-CV-1453 (the "State Lawsuit") be transferred to this Court and consolidated with the above captioned case. This motion is brought under 28 U.S.C. § 1404.

As will be shown below, the State Lawsuit would have ultimately been brought in this Court but for the timing of a United States Supreme Court decision which changed the law relevant to the case. Furthermore, the main issue in the State Lawsuit was whether at some point during the confidential 7th Circuit mediation process the Jensens inadvertently irrevocably agreed to let the Defendant acquire their home and entire property as part of a road project, as

opposed to only letting the Defendant acquire the small tip their property (0.133 acres) that was actually needed for the road project.

28 U.S.C. § 1404(c) provides that "A district court may order any civil action to be tried at any place within the division in which it is pending." 28 U.S.C. § 1404(b) provides that "Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district." 28 U.S.C. § 1404(a) provides that "for the convenience of parties and witnesses, in the interest of justice, a district may transfer any civil action to any other district where it might have been brought . . . ." The statutes make it clear that this Court may order the transfer and consolidation of Racine County Case 18-CV-1453 with the above captioned case.

I. Factual Background and History of the Case.

In 2017, Wisconsin passed legislation to attract Foxconn, a television screen manufacturer, to Wisconsin. The legislation included financial incentives. Mount Pleasant was chosen for the location of the factory, and it started negotiating a contract under which it would agree to acquire the land needed for the Foxconn factory. The Village of Mount Pleasant ("Defendant") ultimately contracted with Foxconn to acquire 2800 acres of privately owned land (the "Acquisition Area") for the Foxconn factory development. In conjunction with the Foxconn factory development, the Defendant and WisDOT decided to improve some of the roads in the area, including the I 94 East Frontage Road (the "Road Project").

Plaintiffs Rodney and Catherine Jensen ("the Jensens") own a three acre parcel of land ("the Jensen Property") in the Acquisition Area and abutting one of the roads that was selected for improvement. While the entire Jensen Property was at one time supposedly needed for the Foxconn project, only a very small part (0.133 acres) of the Jensen Property is needed for the Road Project.

As of the writing of this brief, the Road Project is complete, the Jensens are still living in their home, and as part of the Road Project a new driveway was constructed for the Jensens as shown in the following photograph:

- Jensen Property after completion of Road Project -

Johnson Aff. ¶ 6; Johnson Aff., Ex. A.

A. The Federal Lawsuit

This Court is very familiar with the Federal lawsuit because it was decided by this Court. In a nutshell, landowners who owned seven parcels of land filed a lawsuit in this Court on January 8, 2018. The lawsuit requested an injunction to prevent the Defendant from acquiring their land for the Foxconn project, along with other relief. This Court dismissed the case because some of the claims failed to state a claim, and other claims were unripe.[1] The landowners appealed to the 7th Circuit, and the 7th Circuit referred the case to its confidential mediation program. The confidential mediation resulted in the resolution of six of the seven parcels of land. Later, the United States Supreme Court issued its decision in *Knick v. Township of Scott,* 588 U.S. ___ (2019). That decision resulted in the 7th Circuit remanding this case for further proceedings on the Jensens' "public use" claim under the 5th Amendment. Prior to the Supreme Court's decision, however, the Defendant had initiated the eminent domain process, at which time the Plaintiffs brought a case in state court to challenge the condemnation and to "ripen" the federal claims. The Plaintiffs now seek to transfer the State Lawsuit to this Court and to consolidate the State Lawsuit with the above captioned case.

[1] The Jensens' federal claims under 42 U.S.C. 1983, that the taking at issue in this matter is not for a public purpose, and that the Jensens were deprived of the equal protection of the laws, were pled in the State Lawsuit to avoid being issue precluded and to "ripen" them. This procedure of "exposing" the federal claims, but then "reserving" them was, in the Jensens' counsels' understanding, what was required to preserve those claims under *San Remo Hotel, LP v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). As it turned out, the Supreme Court decision in *Knick v. Township of Scott,* No. 17-647, 588 U.S. ___ (2019) changed the landscape of this type of litigation, however the attempt to "ripen" and "expose" the claims should hopefully convince all involved that Plaintiffs' intention was to eventually bring this matter back before this Court.

B. The State Court Lawsuit

While the 7th Circuit confidential mediation was ongoing, the Defendant commenced the eminent domain process on the Jensens' land by issuing a "jurisdictional offer" to the Jensens. The jurisdictional offer was ostensibly for the Road Project. However, the jurisdictional offer did not attempt to take only the small amount of land (0.133 acres) actually needed for the Road Project. The jurisdictional offer attempted to take the entire Jensen Property even though the Defendant's own documents conclusively showed that they only needed 0.133 acres of the Jensens' three acre property for the Road Project. The Defendant's acquisition of the Jensens' whole property would leave the Jensens, and the others who live there, without a home.

At deposition, the Defendant's representative affirmed that the Defendant does not need the entire Jensen property for the Road Project.

> **Attorney Olsen**: As we sit here today, does the Village contend that the entire Jensen property is needed for the east frontage road project?
>
> **Village Representative**: No.

Olsen Aff. ¶ 4, Ex. A, Feb. 1, 2019 (Lois Dep. 37:10-13).

Because the Defendant was attempting to use eminent domain to take land that was not actually needed for the Road Project, the Jensens filed an action under Wis. Stat. § 32.05(5). Actions filed under Wis. Stat. § 32.05(5) are called "right to take" lawsuits because they assert that the exercise of eminent domain is defective and should be nullified, rather than seeking greater compensation.

The Jensens are not disputing the Defendant's right to acquire the 0.133 acres actually needed for the Road Project. The road is already built and the Jensens are happily living in their

home with the new road in place. The Jensens are challenging the taking of their remaining property that the Defendant admits is not needed for the Road Project.[2]

Typically, the government would not be able to take land for a project when the land is not needed for the project. The Defendant's *only viable* argument is that the Jensens accidentally acquiesced to the acquisition of their entire property (as opposed to just the 0.133 acres needed for the road) at some point during the confidential 7th Circuit mediation process.

Because the Defendant is taking more land than it needs for the Road Project, and because the Defendant failed to follow the required procedure, the taking should be declared void. Again, the Defendant's only viable defense is that the Jensens accidentally consented to the taking of their entire property during the confidential 7th Circuit mediation process. The resolution of the State Lawsuit hinges on one question: did the Jensens inadvertently irrevocably agree to the Defendant taking their entire home and land during the confidential 7th Circuit mediation process? We submit that this Court is in the best position to answer this question.

II. Wisconsin Law Relevant to the State Lawsuit

Under Wisconsin law, a condemning authority must strictly adhere to the statutory framework for eminent domain, otherwise the taking is defective, and therefore void.

> . . . ch. 32 provides the exclusive procedure in condemnation actions, including the requirement to negotiate before making a jurisdictional offer to purchase. We explained that we strictly construe the portions of ch. 32 that apply to condemnation by requiring that the condemnor complete all of the statutory steps because condemnation is in derogation of the common law.

[2] **Attorney Olsen**: As we sit here today, does the Village contend that the entire Jensen property is needed for the east frontage road project? **Village Representative**: No. Olsen Aff. ¶ 4, Ex. A, Feb. 1, 2019 (Lois Dep. 37:10-13).

Warehouse II v. Dept. of Transp., 2006 WI 62, ¶ 8, 291 Wis. 2d 80, 715 N.W.2d 213 (citing *Herro v. Nat. Res. Bd.*, 53 Wis. 2d 157, 171, 192 N.W.2d 104 (1971) ("Ch. 32, Stats., provides the exclusive procedure in condemnation actions. The statutes are in derogation of the common law and therefore are to be strictly construed.")).

Although the condemning authority must strictly follow the statutory rules for set forth in ch. 32, the landowner has a very short window to challenge the taking. A landowner must file a lawsuit under Wis. Stat. § 32.05(5) within 40 days of when a "jurisdictional offer" is issued, or be forever barred from asserting any claim that the taking is defective. Wis. Stat. § 32.05(3)(h). A lawsuit under Wis. Stat. § 32.05(5) is known as a "right to take" lawsuit because it challenges the condemning authority's right to take the property. The State Lawsuit is a "right to take" action, that also pled the federal claims to ripen them and attempt to avoid claim preclusion.

Five parts of the statutory framework governing eminent domain are particularly important to understanding why the State Lawsuit hinges almost entirely on the 7th Circuit confidential mediation process. They are:

(1) the relocation order in § 32.05(1)(a). The relocation order includes a map, or plat, which shows exactly how much land the government needs for the project (in this case 0.133 acres);

(2) the jurisdictional offer in § 32.05(3). This is a formal offer, served by certified mail, to force the sale or taking of the property from the landowner;

(3) the award of damages in § 32.05(7). If the jurisdictional offer is not accepted, this document vests title in the condemnor;

(4) the uneconomic remnant analysis in § 32.05(3m); and

(5) the right to take lawsuit under § 32.05(5).

The relocation order is the document that the condemning authority uses to establish the land and interests that it needs for a public project. "This order shall include a map or plat showing the old and new locations and the lands and interests required." Wis. Stat. § 32.05(1)(a) ("Relocation Order"). In this case, the relocation order established that the Defendant needed 0.133 acres of the Jensen property and some access rights for road widening purposes.

The second part of the statutory framework is the Jurisdictional offer. Wis. Stat. § 32.05(3). The jurisdictional offer is "a jurisdictional requisite to a taking by condemnation." Wis. Stat. § 32.05(4). The Jurisdictional offer is a formal offer to acquire the lands specified in the relocation order and it must strictly adhere to the statutory requirements set forth in Wis. Stat. § 32.05(3).

The third part of the framework is the award of damages. If the jurisdictional offer is not accepted by the landowner, then the condemning authority may record an "award of damages" at the register of deeds office, thereby vesting title in the condemning authority. Wis. Stat. § 32.05(7)(c). The "award shall state that it is made pursuant to relocation order . . . .", Wis. Stat. § 32.05(7)(a), and is conditioned upon payment of the amount of money specified in the jurisdictional offer. Wis. Stat. § 32.05(7)(d).

The fourth part of the statutory framework is what is known as the "uneconomic remnant" statute. This statute states that if the taking of part of a landowner's land would leave the remaining part of "such size, shape, or condition as to be of little value or of substantially impaired economic viability," Wis. Stat. § 32.05(3m)(a), then the condemning authority shall "offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if

the owner consents." Wis. Stat. § 32.05(3m)(b) (emphasis added). In this case the Defendant did not offer to acquire only the needed part of the Jensen Property concurrently with making the jurisdictional offer, and the Plaintiffs did not consent to the Defendant taking of their entire property, so the Defendant should never have taken more than the 0.133 acres.

The last part of the statutory framework is the "Court action to contest right of condemnation" statute. This statute states that a landowner who believes that the condemning authority failed to correctly follow the statutory framework may file a "Court Action to Contest Right of Condemnation" under Wis. Stat. § 32.05(5). The statute explains "Such action shall be the only manner in which any issue other than the amount of just compensation, or other than proceedings to perfect title . . . may be raised pertaining to the condemnation of the property described in the jurisdictional offer." Wis. Stat. § 32.05(5).

A. The taking was improper under Wisconsin law because the relocation order showed that the Defendant only needed 0.133 acres, yet the jurisdictional offer was for the entire three acre parcel.

Prior to condemning land, the government must determine exactly what land is needed for the public project, this is accomplished through a document called a relocation order. Under Wis. Stat. §32.05(1), the relocation order must include "a map or plat showing the old and new locations and the lands and interests" that are required for the public project. The plat, or right of way plat, often includes a table called a "Schedule of Lands and Interests" specifically showing the interests in land needed from each landowner. Wis. Stat. § 32.05(1)(a). In this case, the Schedule of Lands and Interests in the Plat states that only 0.133 acres of the Jensen Property are needed for the road project. Olsen Aff. ¶ 6, Ex. C, Feb. 1, 2019 (Relocation Order, Exhibit 2 to

the Deposition of Claude Lois); Johnson Aff. ¶¶ 11, 12, 13; Johnson Aff. Ex. C. The Plat shows that only the tip of the Jensen property was needed for the Road Project. Johnson Aff. ¶¶ 11, 12, 13; Johnson Aff. Ex. C.

The Defendant's representative agreed at deposition that only 0.133 acres of the Jensen Property was needed for the Road Project. Olsen Aff. ¶ 4, Ex. A, Feb. 1, 2019 (Lois Dep. 14:2-14:14). The Village representative could not explain why the Defendant needed any part of the Jensen property other than the small tip area shown on the right of way plat. Olsen Aff. ¶ 4, Ex. A, Feb. 1, 2019, (Lois Dep. 8:8-8:18). As pointed out by Mr. Johnson, when an entire parcel is needed for a project, then the entire parcel is cross hatched on the plat. Johnson Aff. ¶¶ 11, 12, 13; Johnson Aff. Ex. C. In this case, only the tip of the Jensens' parcel was cross hatched, this is conclusive evidence that the entire Jensen parcel was not needed for the Road Project. Johnson Aff. ¶¶ 11, 12. Because the taking exceeded what was written in the Relocation Order, and what was actually needed for the Road Project, the taking was excessive.

The jurisdictional offer to the Jensens was defective. The jurisdictional offer is required to follow a specific form and contain specific information. Wis. Stat. § 32.05(3), Johnson Aff. 12/15/19 ¶ 9. The jurisdictional offer is required to reference the relocation order, Wis. Stat. § 32.05(3)(a), describe the property to be taken, Wis. Stat. § 32.05(3)(b), itemize the compensation, Wis. Stat. § 32.05(3)(d), and, if there is an uneconomic remnant identified, offer to acquire it concurrently, Wis. Stat. § 32.05(3m). The jurisdictional offer was defective in a number of ways. The jurisdictional offer was defective because it was for the whole Jensen Property when only 0.133 acres was designated as being needed by the relocation order, the schedule of lands and interests, and the right of way plat. Olsen Aff. ¶ 7, Ex. D, Feb. 1, 2019

(Jurisdictional Offer, Exhibit 3 to the Deposition of Claude Lois); Johnson Aff. ¶¶ 4, 11, 13; Johnson Aff Ex. C. The jurisdictional offer was required to *offer* to acquire only the 0.133 acres needed for the Project. Johnson Aff. ¶ 15; Wisconsin Constitution Article I sec. 13, U.S. Const. amend. V.

The award of damages was similarly defective. The award of damages was defective because it purported to take the entire property instead of taking only the 0.133 acres needed for the road. Olsen Aff. ¶ 5, Ex. B, Feb. 1, 2019 (Award of Damages, Exhibit 1 to the Deposition of Claude Lois).

The Jensens never consented to the acquisition of their entire parcel by condemnation. The Wisconsin Statutes are very clear that any challenge to a taking, other than the amount of compensation, must be raised in an action brought under Wis. Stat.§ 32.05(5)(3m). The relevant portion of the statute reads as follows:

> If an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, the owner may . . . within 40 days from the date of postmark of the certified mail letter transmitting such offer . . . commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other than the amount of just compensation, or other than proceedings to perfect title under ss. 32.11 and 32.12, may be raised pertaining to the condemnation of the property described in the jurisdictional offer.

Wis. Stat. § 32.05(5). Because the taking was defective, and because the Jensens timely filed their Wis. Stat. § 32.05(5) challenge, the taking should have been declared void.

B. The Defendant's only defense is that the Jensens inadvertently irrevocably agreed to the taking of their entire property during the confidential 7th Circuit mediation process.

The Defendant's argument is centered on a letter that an individual named Peter Miesbauer sent to the Jensens prior to making the Jurisdictional Offer ("the Miesbauer Letter")[3]. The Defendant had hired Peter Miesbauer to help them acquire the parcels in the Foxconn project area. As the matter unfolded, the Jensens and a number of other Plaintiffs sued the Defendant in federal district court. The federal district court case was ultimately dismissed as being unripe at which point the landowners appealed to the 7th Circuit. The 7th Circuit referred the case to a confidential mediation under the auspices of the 7th Circuit. While the confidential mediation under the auspices of the 7th Circuit was ongoing, Mr. Miesbauer wrote a letter to the Jensens. The Defendant's argument is that the the Miesbauer letter relieved the Defendant of its obligation to acquire only the part of the Jensen property needed for the Road Project. This argument is plainly wrong because the Jensens timely filed an action under Wis. Stat. § 32.05(5) which gives the Jensens the ability to challenge any defect in the taking. There is nothing in the statutes or any law that the Defendant has been able to cite that would suggest that prior to filing a challenge under Wis. Stat. § 32.05(5) the Jensens were required to respond in writing to the Miesbauer letter.

The statute is clear that an action under Wis. Stat. § 32.05(5) is the only means to challenge any defects in the taking process. "Such action shall be the only manner in which any issue other than the amount of just compensation . . . may be raised . . . ." Wis. Stat. § 32.05(5). There is no mention in this statute of the landowner needing to respond to letters sent by agents of the condemning authority in conjunction with the mediation process as a condition precedent to filing an action under Wis. Stat. § 32.05(5).

[3] Plaintiffs moved to exclude testimony and evidence of this letter in their First Motion in Limine, in the State Lawsuit.

Second, mediation is a wide open process, therefore the Jensens would have been free to negotiate on the potential sale of their entire property or any part of it during the confidential 7th Circuit mediation process. The Defendant's position is that statements or positions taken in the context of a confidential mediation process, or even ambiguously drafted letters, could give the Defendant the ability to condemn the Jensens' entire three acre parcel and home even though the Defendant, by its own admission, only needed 0.133 acres and some access rights for the Road Project.

Third, the Defendant's argument is that the Miesbauer letter, sent in the context of the confidential 7th Circuit mediation process, gave it the power to use eminent domain to take the Jensens' home away even though it was not needed for the Road Project and the Jensens did not consent. This brings the entire mediation process into issue. The Jensens will have to call witnesses from the mediation, including the other landowners from the group and possibly the 7th Circuit mediator. This Court is in the best position to decide whether to exclude the mediation evidence altogether, or, if some mediation evidence is to be allowed, to decide which witnesses are appropriate to allow each side call, and whether the trial will have to be closed to the public and conducted under seal in order to prevent the disclosure of confidential mediation information. This process will be extremely cumbersome and a waste of judicial and litigant resources. It will also cut against the strong public policy of encouraging mediation. It is the direct result of the Defendant attempting to bootstrap the eminent domain acquisition of the entire Jensen property into an acquisition of 0.133 acres of the Jensen Property that was needed for the Road Project by way of things that the Village believes happened during the mediation process.

The law is clear that an action under Wis. Stat. § 32.05(5) is the only way to challenge any defects in the takings process. Any letter that the Jensens or the Defendant could have written prior to filing a timely action under Wis. Stat. § 32.05(5) would have been unnecessary. The Jensens were under no obligation to draw the Defendant's attention to any of the various defects in the takings process as a prerequisite to filing a suit under Wis. Stat. § 32.05(5). In fact, the opposite is true, not amount of letters, emails, or phone calls alerting the Defendant to the various defects in the takings process would have had any effect at all if the Jensens had failed to timely file a challenge under Wis. Stat. § 32.05(5). However, the Jensens did file a timely challenge action under Wis. Stat. § 32.05(5), as stated in the statutes, this is the only way to challenge a defective taking. Accordingly, the Jensens properly challenged the taking by filing an action under 32.05(5) and all of the defects in the process were thereby brought into issue.

C. The taking is void because the Defendant did not issue a jurisdictional offer for only the 0.133 acres that it needed for the Road Project.

The Defendant was required to issue a jurisdictional offer only for the 0.133 acres that it needed. If there was an uneconomic remnant, the Defendant was required to offer to acquire it concurrently under Wis. Stat. § 32.05(3m). In no event could the Defendant force the acquisition of the entire parcel. The Defendant seems to be making the argument that because they acquired the access rights to the Jensen property, the property is landlocked. Because they property is landlocked, the Defendant reasons, it is an uneconomic remnant, and because the property is an uneconomic remnant, the Defendant incorrectly believes it is allowed to acquire it using eminent domain. The Defendant's analysis fails for two reasons. First, the property is not landlocked and

is not an uneconomic remnant. Second, even if the property were an uneconomic remnant, landowners are not automatically required to sell uneconomic remnant parcels, rather the Defendant is required to *offer to acquire* the uneconomic remnant parcel. The Defendant did not follow the procedure under Wis. Stat. § 32.05(3m) - the Defendant was required to issue a jurisdictional offer for the 0.133 acres and *concurrently offer* to acquire an uneconomic remnant.

The Jensen Property is not even landlocked. The Jensen property still has access to the frontage road after the Road Project, the Jensens live there and drive in and out constantly. After the Road Project, the Jensen Parcel still has access to the frontage road over the newly asphalted driveway. The Plat shows that after the Road Project, the Jensen Property will have access over the neighboring parcel to the south by means of a driveway. Johnson Aff. ¶¶ 4, 5; Johnson Aff Ex. C. The Plat designates some parcels as being landlocked, however the Plat *does not* designate the Jensen Property as being landlocked. Johnson Aff. ¶ 5; Johnson Aff Ex. C. The engineering diagrams for the Road Project show that as part of the Project a new asphalt driveway entrance will be built for the Jensen Property. *Id.* A new asphalt driveway entrance was actually constructed for the Jensen Property as part of the road project. Johnson Aff. ¶ 6; Johnson Aff Ex. A. As pointed out by Mr. Johnson, the Jensen driveway would not be rebuilt with a brand new driveway entrance as part of the engineering design if the intention of the Project was to landlock the Jensen Property. *Id.* Even after the Road Project, the Jensen Property still has vehicular access to the frontage road by means of the newly improved driveway. Johnson Aff. ¶¶ 6, 8.

After the Project, the Jensen Property is not an "uneconomic remnant" (although it makes no difference if it is). After the Project, the Jensen Property is not damaged in any way other than

the loss of a small 0.133 acre part of the lot and some access rights that were not in active use. Johnson Aff. ¶¶ 4, 6, 13, 14, 16.

Johnson Aff. ¶ 6; Johnson Aff Ex. A. The Jensens still live in their home. They still pay the mortgage. Olsen Aff. ¶ 8, Ex. E, Feb. 1, 2019 (Jensen Dep. 35:9-35:14). They come and go from the frontage road over the new driveway that the Defendant constructed for them. The test for an uneconomic remnant is whether the remaining property is of little value or substantially impaired economic viability. Wis. Stat. § 32.05(5). The Jensen Property holds its value as a nice rural home after the project. The fact that the Jensens and others live there and enjoy it as a home ensures that the property's economic viability is completely intact. The Jensen property was not rendered an uneconomic remnant by the Road Project. Contrast the definition of an uneconomic

remnant given by Wis. Stat. § 32.05(3m)(a) ("the property remaining is of such size, shape, or condition as to be of little value or of substantially impaired economic viability") with a pleasant home and functional driveway on three acres of rural land. Johnson Aff. ¶¶ 14, 16.

The uneconomic remnant statute is clear that if the Defendant believed that an uneconomic remnant was created, then they were required to *offer to acquire it concurrently* with the Jurisdictional Offer for the 0.133 acres. Wis. Stat. § 32.05(3m) ("the condemnor shall offer to acquire the remnant concurrently"). The Defendant did not "offer to acquire the remnant concurrently" therefore if the Defendant believed there was an uneconomic remnant involved then the jurisdictional offer was flawed. If there was not an uneconomic remnant, then there was no basis for the Defendant to acquire the entire property, and the jurisdictional offer should only have been for the 0.133 acres and access rights. Therefore, whether or not there was an uneconomic remnant, the jurisdictional offer and the award of damages that flowed from it were defective and, as a consequence, void.

While the Defendant was legally permitted to *concurrently offer* to acquire the remainder of the Jensen Property if the Defendant thought it was an uneconomic remnant, Wis. Stat. § 32.05(3m), the Defendant did not do this. Johnson Aff. ¶ 15. Instead the Defendant only offered to acquire the entire property in the jurisdictional offer. Olsen Aff. ¶ 7, Ex. D, Feb. 1, 2019 (Jurisdictional Offer, Exhibit 3 to the Deposition of Claude Lois). Therefore the jurisdictional offer was defective. The jurisdictional offer was also defective because it referenced the wrong date for the relocation order. Olsen Aff. ¶ 8, Ex. E, Feb. 1, 2019 (Jensen Dep. 18:14-19:15); Johnson Aff. ¶ 9. The jurisdictional offer was defective because it did not specify the value of the supposed uneconomic remnant or the value of the access rights. Johnson Aff. ¶ 9. Additionally,

the award of damages is defective because it does not separately describe the uneconomic remnant, and makes no mention of the acquisition of access or of a purported uneconomic remnant. Johnson Aff. ¶ 10.

The Jensens never consented to the acquisition of their entire Parcel by condemnation, therefore it was unlawful to for the Defendant to condemn the Jensens' entire parcel when only the 0.133 acre tip of it was needed for the road project. As stated clearly by Mr. Johnson: "Even if Parcel 213 was an uneconomic remnant the Defendant could not acquire it without the landowner's express consent which was never given." Johnson Aff. ¶ 16.

III. The State Court Lawsuit Should be Transferred to This Court

This Court has a substantial degree of power to transfer the State Lawsuit to this Court. "The statutory language guides the court's evaluation of the particular circumstances of each case and is broad enough to allow the court to take into account all factors relevant to convenience and/or the interests of justice." *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 978 (7th Cir. 2010). The statutory language strongly favors transfer in a case such as this one. 28 U.S.C. § 1404 (c) provides that "A district court may order any civil action to be tried at any place within the division in which it is pending." 28 U.S.C. § 1404 (b) provides that "Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district." 28 U.S.C. § 1404 (a) provides that "for the convenience of parties and witnesses, in the interest of justice, a district may transfer any civil action to any other district where it might have been brought . . . ." [W]e grant a substantial degree of deference to the district court in deciding whether transfer is appropriate … The statutory language … is broad enough to allow the court to take into account all factors relevant to convenience and/or the interests of justice. *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 977-78 (7th Cir. 2010) (citations omitted).

The 7th Circuit has taught that in considering a transfer of venue, a number of factors should be considered. *Research Automation*, 626 F.3d at 978-79. These factors are discussed in turn.

1) Convenience - the availability of and access to witnesses, and each party's access to and distance from resources in each forum.

This factor is in balance. This Court sits in Milwaukee, Wisconsin, and the State Lawsuit court sits in Racine. Racine is only about thirty miles from Milwaukee. Defendant's attorneys are located in Milwaukee, while Plaintiffs' attorneys are located in Madison. The likely witnesses in the case, as well as the attorneys, are all in easy distance of both Milwaukee and Racine.

2) The location of material events and the relative ease of access to sources of proof.

This factor is in balance for the same reasons as factor #1.

3) The "interest of justice" including docket congestion and likely speed to trial in the transferor and potential transferee forums.

This factor tips strongly in favor of the Plaintiffs. The State Lawsuit was only filed in order to "ripen" and "expose" the claims so that they could eventually be brought back before this Court. Whatever speed this case could be tried in Racine County would not matter because that would only be the first, or "ripening" step to bring the case back before this Court. The analysis is further bolstered in Plaintiff's favor because the change of law brought about by *Knick v. Township of Scott,* 588 U.S. ___ (2019) is a substantial and definite change in circumstances. After *Knick*, there is no more "ripening" or "exposing" of claims, and had *Knick* been decided earlier, the State Lawsuit would have been brought before this Court to begin with under 28 U.S.C. § 1367 supplemental jurisdiction. Simply put, the Plaintiffs only filed the State Lawsuit because of this Court's decision in this case. Now that the United States Supreme Court

has changed the law via the *Knick* decision, it is only just to allow the Plaintiffs to bring their case back before this Court.

4) Each court's relative familiarity with the relevant law.

This factor is in favor of the Plaintiffs because while both courts are extremely familiar with Wisconsin law, this Court is in a better position to decide the issues related to the 7th Circuit confidential mediation process.

5) The respective desirability of resolving controversies in each locale and the relationship of each community to the controversy.

This factor is in balance, while it is true that the events occurred in Racine County, the events also occurred in this Court's district. Furthermore, the subject matter of the lawsuit (taking of private property for a private rather than public purpose) is of statewide interest. The idea that the taking is for road purposes is pretextual in the Plaintiffs' opinion since there is no reason that the government would take three acres and a home when the Road Project only needed 0.133 acres from the tip of the property.

6) The plaintiff's choice of forum is afforded deference.

This factor tips very strongly in favor of transfer to this Court. While the Defendant may try to argue that the Plaintiffs brought the State Lawsuit in Racine County Circuit Court, the argument would be specious. The Plaintiffs originally filed in this Court, their case was dismissed on the basis of *Williamson County* ripeness, and they appealed. While the appeal was

pending the Defendant served a jurisdictional offer that set in motion a 40 day statute of limitations to challenge the taking or any part of it. The Plaintiffs then filed in Racine County Circuit court, and re-pled their federal claims in order to try to ripen them. The *Knick* decision then changed the law and did away with *Williamson County* ripeness altogether. Therefore, it is clear that the Plaintiffs originally elected the venue of this Court, and only filed in Racine County Circuit Court because they understood that they were required to do so to ripen their claim and avoid litigating the 40 day statute of limitations under Wisconsin law. The *Knick* decision changed the circumstances. Had *Knick* been decided prior to the Defendant's service of the jurisdictional offer, the Defendant might have an argument here, but that is not the case. The Plaintiffs only filed their case in Racine County because of this Court's order that was based on the law in effect at that time. Now that the law has changed the Plaintiffs' clear choice of forum should be given substantial weight.

The situation might also be different if the Plaintiffs were trying to challenge the taking of the 0.133 acres of their land actually needed for the Road Project. This is not the case. To be clear: the Plaintiffs are not challenging the Defendant's right to acquire the 0.133 acres of their land needed for the Road Project. The Plaintiffs are challenging the Defendant's attempt to take their home and remaining 2.87 acres under the theory that the Plaintiffs accidentally agreed to such a thing during the confidential 7th Circuit mediation process.

While the 7th Circuit appeal and State Lawsuit were both pending, the Supreme Court decided *Knick v. Township of Scott, Pennsylvania.* In *Knick,* the Supreme Court ruled that landowners are not required to exhaust all state law remedies prior to filing a federal takings claim under §1983. In doing so the *Knick* Court overruled *Williamson County Regional Planning*

Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). The law under *Williamson County* held that "a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights–and thus cannot bring a federal takings claim in federal court–until a state court has denied his claim for just compensation under state law." However, as the Court subsequently recognized in *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323(2005), a state court's resolution of a claim under state law all too often had a preclusive effect in any subsequent federal suit. The *Knick* Court ruled that "[t]he takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning." The *Knick* Court concluded that the state-litigation requirement imposes an unjustifiable burden on taking plaintiffs, conflicts with the rest of our taking jurisprudence, and must be overruled."

Now, "a property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." Had *Knick* been decided earlier, this case would never have been dismissed and the state law claims would have been brought in this case to begin with. Since *Knick* was decided after the State Lawsuit had been filed, the dispute is spread across multiple forums.

Lastly, as shown above, the biggest issue in the State Lawsuit is whether or not the Plaintiffs inadvertently and irrevocably agreed to the condemnation of their entire property in conjunction with the confidential 7th Circuit mediation process. This Court is certainly in the best position to decide this question. As such, Plaintiffs respectfully request that the State Lawsuit be transferred to this Court.

Dated this 8th day of August, 2019.

Eminent Domain Services, LLC

Electronically Signed by Erik S. Olsen
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