STATE OF WISCONSIN **CIRCUIT COURT** **KENOSHA COUNTY**

KRISTI LACROIX and
CARRIEANN GLEMBOCKI,

Plaintiff,

Case No.: 13-CV-1899

v.

KENOSHA UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION, KENOSHA UNIFIED
SCHOOL DISTRICT and KENOSHA EDUCATION
ASSOCIATION BUILDING CORPORATION,
d/b/a KENOSHA EDUCATION ASSOCIATION,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS KENOSHA UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION AND KENOSHA UNIFIED SCHOOL DISTRICT'S MOTION TO DISMISS

Since the passage of Wisconsin 2011 Act 10 and 2011 Act 32 (together known as "Act 10"), public employers have faced competing claims and conflicting judicial decisions regarding the legality and applicability of the law. The Kenosha Unified School District has attempted to comply with the law according to its understanding of these various court decisions. In particular, it was the District's understanding, until October 21, 2013, that Act 10 prohibited it from engaging in collective bargaining with the Kenosha Education Association because the Association had not been recertified as the bargaining agent for district teachers.

However, on October 21, 2013, the Honorable Juan Colás of the Circuit Court for Dane County held that the Wisconsin Employment Relations Commission was in contempt of court for implementing Act 10 against certain entities, including the Kenosha Education Association. The District understood Judge Colás's contempt decision to mean that the District could now engage in collective bargaining with the Association. As a result of the bargaining, the District and

Association settled on a collective bargaining agreement for Kenosha teachers. Plaintiffs filed this suit immediately, contending that the District actually violated various provisions of Wisconsin law by attempting to comply with it.

The Kenosha Unified School District and Kenosha Unified School District Board of Education now move the court to dismiss plaintiffs' complaint. First, plaintiffs failed to give the District an opportunity to evaluate plaintiffs' claims outside the context of litigation by filing the notice required by Wis. Stat. § 893.80(1d). Under that statute, no claim may be brought against a school district or its agent unless the plaintiff provides notice of the claim 120 days before filing. Compliance with § 893.80(1d) is a necessary prerequisite to plaintiffs' claims brought under Act 10, the Uniform Declaratory Judgment Act and Wisconsin's antitrust laws.

Plaintiffs' only claims not subject to the requirements of § 893.80(1d) are those based on violations of Wisconsin's open meetings law. Those claims should be dismissed for other reasons. Claims under the open meetings law are subject to specific enforcement procedures set forth in the open meetings statute. The failure to follow those procedures is fatal and deprives the court of competency to proceed. Moreover, the allegations of plaintiffs' complaint make clear that the District cured any deficient notice by providing subsequent notice regarding meetings at which the negotiations took place and the collective bargaining agreement was ratified.

Finally, the Court should dismiss plaintiffs' claims against the School Board because plaintiffs' claims are properly brought against the District, not the Board, and any claims against the Board are merely duplicative.

For these reasons, and as explained in more detail below, the Court should dismiss plaintiffs' complaint in full.

BACKGROUND[1]

The passage of Act 10 and Act 32 in 2011 amended Wis. Stat. § 111.70, the statute that governs collective bargaining between public employees and their employers. Among other things, the Act prohibits public employers from negotiating with unions that have not been certified by the Wisconsin Employment Relations Commission as the bargaining agent for employees.

Prior to the passage of Act 10, the Kenosha Education Association had been the collective bargaining representative for Kenosha teachers, and the Kenosha Unified School District had entered into a collective bargaining agreement with the Association. The collective bargaining agreement expired by its terms on June 30, 2013, and under Act 10, the Association was decertified as the collective bargaining agent of Kenosha teachers after that date. Because the Association failed to gain recertification as required by Act 10, the District declined to negotiate a new collective bargaining agreement with the Association and instead undertook the development of an employee handbook.

In the meantime, Judge Colás had entered an order on September 14, 2012, holding parts of Act 10 to be in violation of the Wisconsin Constitution. *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court No. 11CV3774. Although the Association took the position that the District could engage in collective bargaining on the basis of Judge Colás's ruling, the District declined to negotiate and continued to work on the employee handbook.

On October 21, 2013, Judge Colás held that the Wisconsin Employment Relations Commission commissioners were in contempt for implementing Act 10 against entities that had

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[1] These facts are drawn from the allegations of plaintiffs' complaint. At this stage, the Court must accept all of plaintiffs' factual allegations as true. *Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991). That being said, the Court may consider the Affidavit of Sheronda Glass, which defendants submit only in support of their argument that plaintiffs' failure to comply with the municipal notice statute deprives the Court of competency to exercise subject matter jurisdiction under Wis. Stat. § 802.06(2)(a)(2), which they are entitled to do without converting this dismissal motion into one for summary judgment. Wis. Stat. § 802.06(2)(b).

not been parties to the *Madison Teachers* case, including the Kenosha Education Association. On the basis of this ruling, the Association asserted that the District was obligated to collectively bargain with the Association.

On October 22, 2013, the Kenosha Unified School District Board of Education held its regular monthly meeting. The agenda and public notice for the meeting included "discussion/action" on the employee handbook but did not state that the Board would vote on whether to engage in collective bargaining with the Association. At the meeting, a school board member made a motion to postpone action on the handbook and to begin bargaining with representative groups. The motion passed.

On Friday, November 8, 2013, the District issued a public notice that the Board would hold a special meeting on Saturday, November 9, 2013, for the "purpose of . . . discussion/action regarding commencing collective bargaining negotiations with collective bargaining representatives." Plts.' Ex. I. After at least three additional meetings, the District and Association reached a collective bargaining agreement. The agreement was ratified on November 15, 2013.

ARGUMENT

I. Plaintiff's Claims Brought Pursuant to Act 10, the Uniform Declaratory Judgments Act and Wisconsin's Antitrust Laws Must be Dismissed Because Plaintiffs Did Not Comply with the Notice Requirements of Wis. Stat. § 893.80(1d).

A. The Written Notice Requirements Contained in § 893.80(1d) Apply to Plaintiffs' Claims against the District and the Board.

Under Wis. Stat. § 893.80(1d)(a) and (b), claimants must satisfy two prerequisites before filing suit against a municipal defendant. The claimant must provide (1) a written notice of the circumstances of the claims, and (2) a written claim containing an itemized statement of relief

sought.[2] No action may be "brought or maintained" against the District or Board unless both conditions are satisfied and the governmental subdivision disallows the claim."[3] *Id. See also Elkhorn Sch. Dist. v. East Troy Sch. Dist.*, 110 Wis. 2d 1, 327 N.W.2d 206 (Ct. App. 1982); *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 622, 575 N.W.2d 712 (1998). Failure to comply with this procedure requires dismissal of the claim. *Selerski v. Village of West Milwaukee*, 212 Wis. 2d 10, 20-21, 568 N.W.2d 9 (Ct. App. 1997) ("[A]n action that is filed prematurely must be dismissed.").

As a general rule, § 893.80(1d) applies to all causes of action, not just those in tort and not just those for money damages. There are limited exceptions to this general rule for claims brought pursuant to statutes with specific procedures for bringing actions against municipal entities. *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 6, 304 Wis. 2d 702, 738 N.W.2d 168. In deciding whether this exception should apply, Wisconsin courts apply a three-factor test: (1) whether there is a specific statutory scheme for which the

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[2] Wis. Stat. § 893.80(1d) provides in full:

> Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
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> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
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> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

[3] A claim is disallowed in either of two ways: (1) a denial of the claim by the governmental entity is served on the party filing the notice of claim pursuant to the procedure specified in Wis. Stat. § 893.80(1g); or (2) 120 days have expired since presentation of the claim. Wis. Stat. § 893.80(1g); *Colby v. Columbia County*, 202 Wis. 2d 342, 357-58, 362-64, 550 N.W.2d 124 (1996).

plaintiff seeks exemption; (2) whether enforcement of § 893.80(1d) would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80(1d) was enacted would be furthered by requiring that a notice of claim be filed. *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶ 23, 335 Wis. 2d 720, 741, 800 N.W.2d 421; *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 9, 265 Wis. 2d 422, 665 N.W.2d 379.

In this case, plaintiffs cannot satisfy the first factor of the test, and the remaining factors clearly favor dismissal of plaintiffs' claims. With respect to the first factor, the question is whether the claim is brought pursuant to a specific statutory scheme that conflicts with the general intent behind the 120-day time limit provided in Wis. Stat. § 893.80. *E-Z Roll Off, LLC*, 2011 WI 71, ¶ 25. If the answer is yes, the specific statutory scheme will take precedence. *Id.*

In plaintiffs' first and second causes of action, plaintiffs seek declarations that the collective bargaining agreement signed by the District and the Association violated Act 10, Wis. Stat. § 111.70(2), (4)(mb) and (4)(b), and Wisconsin's antitrust laws, Wis. Stat. § 133.03. (Plaintiffs also seek a declaration that the agreement is void because the District and Board violated Wisconsin's open meetings laws. This theory is addressed below.)

In *E-Z Roll Off, LLC*, 2011 WI 71, the Wisconsin Supreme Court addressed the question whether claims for declaratory judgment brought pursuant § 806.04 and the antitrust statutes are subject to the notice of claim requirements of § 893.80. The Court concluded that the claims were subject to § 893.80 under the applicable three-factor test. First, these statutes do not contain specific statutory schemes that conflict with the notice of claim requirements; second, enforcing the general notice of claim requirements promotes prompt resolution of such declaratory judgment claims; and third, requiring compliance with the notice of claim statute would further the purposes of the statute. *Id.* at ¶¶ 28, 32, 34-36.

The same reasoning applies in this case. Plaintiffs' claims are brought pursuant to the general declaratory judgment statute, the antitrust laws and various provisions of Act 10. None of these statutes provides a specific statutory scheme that conflicts with the notice of claim requirements in § 893.80. Likewise, plaintiffs' third case of action, which requests injunctive relief, is not brought pursuant to any specific statutory scheme that allows immediate injunctive relief within a particular time frame. Rather, plaintiffs' request for injunctive relief appears to be based entirely on their underlying claims for declaratory judgment under § 806.04. However, there is no provision in the declaratory judgment statute or any other statute cited by plaintiffs that allows for immediate injunctive relief without compliance with the notice of claim statute.

Additionally, requiring compliance with the notice of claim statute would promote prompt resolution of plaintiffs' claims and would further the purpose of the notice. As the Supreme Court has explained, the notice statute serves two purposes: "(1) to give the governmental entities the opportunity to investigate and evaluate potential claims, and (2) to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation." *Id.* at ¶ 34. *See also City of Racine*, 216 Wis. 2d at 622. Requiring compliance with the notice of claim statute for the types of claims asserted by plaintiffs would clearly allow the District and Board a greater opportunity to investigate and evaluate the claims before being faced with costly litigation, as well as a greater opportunity to compromise. Particularly in a case such as this in which the legal standards have been confusing and uncertain, it is imperative that the District and Board be allowed the opportunity to consider plaintiffs' position and their own decisions without the distraction and expense of litigation. *E-Z Roll Off, LLC*, 2011 WI 71, ¶ 38 ("[I]t is easier for a governmental entity to compromise with a claimant when the governmental entity has the 120-day period required by the notice of claim statute in which it may review the claim and negotiate with the claimant prior to the commencement of litigation.").

B. Plaintiffs Failed to Provide Adequate Notice Under Section 893.80(1d).

Plaintiffs cannot dispute that they failed to provide *any* notice of their claims to the District, much less the specific notice required under § 893.80(1d). *See* Aff. of Sheronda Glass, Ex. A. Before they filed their complaint, plaintiffs never suggested, orally or in writing, that they had claims they planned to assert against the District. Further, plaintiffs failed to provide a written notice of the specific relief sought, as required by § 893.80(1d)(b). *Elkhorn Sch. Dist.*, 110 Wis. 2d at 5 (no action against school district may be brought unless claimant provides itemized statement of relief sought).

Plaintiffs may try to excuse their failure to comply with § 893.80(1d)(a) by arguing that the District had "actual notice" of the claims and that the "failure to give the requisite notice has not been prejudicial" to the District. *See* Wis. Stat. § 893.80(1d)(a). However, plaintiffs cannot meet their burden of proving either actual notice or a lack of prejudice. *E-Z Roll Off, LLC*, 2011 WI 71, ¶¶ 17-18. Neither the District nor the Board was aware that plaintiffs intended to file a lawsuit in response to the District's decision to collectively bargain with the Kenosha Education Association. Plaintiffs' decision to file a lawsuit without first giving the School District and Board the opportunity to address plaintiffs' concerns without costly litigation has caused prejudice to the District already. Moreover, even if the District and Board had actual notice sufficient to excuse plaintiffs from complying with § 893.80(1d)(a), plaintiffs were still required to comply with § 893.80(1d)(b), which does not contain an exception for actual notice or lack of prejudice. *First Transit, Inc. v. City of Racine*, 359 F. Supp. 2d 782 (E.D. Wis. 2005) (dismissing plaintiff's claims against City for failure to comply with Wis. Stat. § 893.80(1d)(b)); *City of Racine*, 216 Wis. 2d at 620 ("We conclude that compliance with sec. 893.80(1)(b) is a

necessary prerequisite to all actions brought against the entities listed in the statute, including governmental subdivisions, whether a tort or non-tort action, and whether brought as an initial claim, counterclaim, or cross-claim.").

C. Plaintiffs' Failure to Comply with § 893.80 Requires Dismissal of Plaintiffs' Claims.

Wisconsin courts have held repeatedly that the notice of claim statute imposes a condition precedent on a party's right to invoke the judicial power to grant relief. *E.g.*, *Rouse v. Theda Clark Med. Ctr, Inc.*, 2007 WI 87, ¶ 19, 302 Wis. 2d 358, 371-72, 735 N.W.2d 30. A plaintiff's failure to satisfy this crucial condition precedent deprives the court of competency to adjudicate the plaintiff's claim, *Village of Trempealeau v. Mikrut*, 2004 WI 79, n.5, 273 Wis. 2d 76, 681 N.W.2d 190, and requires dismissal of the plaintiff's claims. *E.g.*, *City of Racine*, 216 Wis. 2d at 628-30 (dismissing claims against municipal entities because plaintiff failed to comply with Wis. Stat. § 893.80(1[d])); *Probst v. Winnebago County*, 208 Wis. 2d 280, 289, 560 N.W.2d 291 (Ct. App. 1997) (same); *First Transit, Inc.*, 359 F. Supp. 2d at 789 (same). Accordingly, plaintiffs' claims must be dismissed because the Court lacks competency to hear them.

II. Plaintiffs' Claims Based on Violations of Open Meetings Law Should be Dismissed.

Plaintiffs allege in their complaint that the District and Board failed to provide proper notice for the October 22, 2013 meeting as required by the open meetings laws. Claims premised on open meetings violations are not subject to the notice requirements of Wis. Stat. § 893.80 because the open meetings statute provides specific statutory guidelines for bringing such claims. Wis. Stat. § 19.97(5) ("Sections 893.80 and 893.82 do not apply to actions commenced under this section."); *State ex. rel Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (exempting claims for open records violations and open meetings violations from application of Wis. Stat. § 893.80). However, plaintiffs' claims based on an alleged open

meetings violation should be dismissed precisely because plaintiffs failed to follow the specific procedures set forth in the open meetings statute. Additionally, plaintiffs' claims should be dismissed because plaintiffs' allegations make it clear that the District and Board cured any open meetings notice deficiencies by issuing a separate notice before engaging in further negotiations or entering into the collective bargaining agreement with the Association.

A. Plaintiffs Failed to Follow the Enforcement Procedures Established in the Open Meetings Law Before Filing this Action.

The Open Meetings Law statute provides a specific procedure for enforcement, including that any individual bringing an action must file a verified complaint with the district attorney and must bring any subsequent actions on behalf of the State. Wis. Stat. § 19.97(1) and (4). The failure to bring an action on behalf of the State under § 19.97 is fatal and deprives the court of competency to proceed. *Fabyan v. Achtenhagen*, 2002 WI App 214, ¶¶ 7-13, 257 Wis. 2d 310, 652 N.W.2d 649 ("The trial court lacked the competence to proceed with this case because the clear mandates of [§ 19.97] were not followed."). *See also State v. State of Wisconsin Dept. of Veterans Affairs*, 2013 WI App 94, ¶ 5, 349 Wis.2d 526, 835 N.W.2d 291 (unpublished) ("[I]f an open meetings action is brought in the name of a private person, rather than as "State ex rel.," the court lacks competency to proceed.").

Therefore, plaintiffs' claims that are dependent on the allegation that the District and Board violated Wis. Stat. § 19.84 must be dismissed for failure to comply with the requirements of § 19.97.

B. Plaintiffs' Allegations Establish that the District Cured Any Violation of the Open Meetings Law by Issuing a New Notice Regarding the Commencement of Collective Bargaining.

Plaintiffs allege that the School District and School Board violated the open meetings law requirements set forth in Wis. Stat. § 19.84 by failing to give proper notice that the Board intended to take up the issue of collective bargaining at the October 22, 2013 meeting. Plaintiffs

contend that the subsequent collective bargaining agreement entered into between the District and the Association should be voided because of the inadequate notice.

Even assuming that the Board's notice for the October 22 meeting was inadequate, plaintiffs' allegations do not support a claim for voiding the collective bargaining agreement. It is clear from plaintiffs' allegations that the final collective bargaining agreement was not the result of the October 22 meeting. Rather, according to plaintiffs' own allegations, the Board held at least three subsequent meetings before ratifying the agreement. Plaintiffs' do not allege that the Board failed to provide adequate notice for those subsequent meetings. In fact, plaintiffs allege that the Board provided notice on November 8, 2013 that it would be meeting on November 9, 2013 to discuss and take action regarding "commencing collective bargaining negotiations." Plts.' Cpt. ¶ 34; Plts.' Ex. I. According to plaintiffs' own exhibit, the Board issued the November 8 notice in order to correct any problems caused by the alleged inadequate notice for the October 22, 2013 meeting. Plts.' Ex. H.

In sum, even if the Board's notice for October 22 meeting was insufficient to provide notice that the Board would consider whether to begin collective bargaining, the Board's one-time error does not mean the Board could never engage in collective bargaining. The open meetings law does not require such a result because that would be absurd. Rather, the open meetings law exists to insure that the public is informed to the fullest extent regarding the affairs of the government. *State ex rel. Badke v. Greendale Village Bd*, 173 Wis. 2d 553, 566, 494 N.W.2d 408 (1993). In this case, the public was informed about the affairs of the District before the District made any final decisions regarding the collective bargaining agreement with the Association.

It may be a different analysis if plaintiffs were seeking merely to enforce the notice provisions of the open meetings law. For example, in *State ex rel. Badke*, 173 Wis. 2d 553, the

Wisconsin Supreme Court explained that a plaintiff's open meetings claim was not mooted by the fact that the Village Board had held a "revote" on a development permit that had been approved at a meeting in violation of open meetings rules. *Id.* at 566. However, in that case, the "heart" of the plaintiff's dispute was the Village's proceeding, not the granting of the permit. *Id.* In contrast, the "heart" of plaintiffs' dispute in this case is the collective bargaining agreement signed by the District and the Association, not the allegedly deficient notice regarding the October 22, 2013 meeting. The plaintiffs' are not simply seeking a declaration that the notice was insufficient; they are seeking a declaration that the collective bargaining agreement signed several days later is void. In light of the District's subsequent notices and meetings, it would be improper to void the agreement on the basis of the October 21 notice.

III. Plaintiffs' Claims against the School Board Should be Dismissed.

Wis. Stat. ch. 120 defines the powers and duties of school districts and school boards. Under Wis. Stat. § 120.44, a unified school district has the power to sue and be sued. The chapter does not provide that school boards can also sue and be sued. This makes sense, particularly in the context of this case. Plaintiffs seek to enjoin the operation of a collective bargaining agreement that was entered between the District and the Kenosha Education Association. The Board is not a party to the agreement and plaintiffs are not seeking relief from individual board members. Therefore, the District, not the Board, is the proper defendant in this case.

Moreover, any claim plaintiffs have asserted against the Board are duplicative of those asserted against the District and should be dismissed. Courts commonly dismiss redundant parties in similar situations. *E.g.*, *Savory v. Lyons*, 469 F.3d 667, n. 1 (7th Cir. 2006) (noting that district court dismissed claims against police chief as redundant of claims against city); *United Church v. City of Chicago*, 502 F.3d 616, 624 (7th Cir. 2007) (noting that district court dismissed

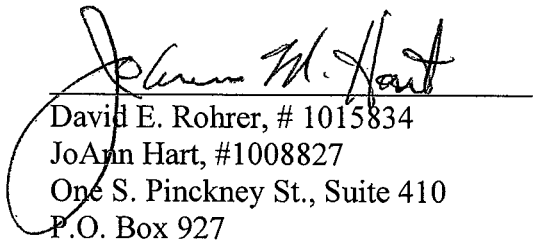
claims against mayor as redundant to claims against city); *Contreras v. City of Chicago*, 119 F.3d 1286, n. 1 (7th Cir. 1997) (noting that district court dismissed official capacity claims as redundant of claims against city).

IV. Conclusion

For the reasons stated above the Court should dismiss all of the claims asserted in plaintiffs' complaint.

Dated this 5th day of December, 2013

BOARDMAN & CLARK LLP



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