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June 6, 2014

Via Federal Express

Honorable David Bastianelli
Kenosha County Courthouse, Branch 1
912 56th Street, Room 205
Kenosha, WI 53140

RECEIVED
6/9/14

Re: Lacroix, et al, v. Kenosha Unified School District Board of Education, et al.
Case No. 13-CV-1899

Dear Judge Bastianelli:

Enclosed for filing in the above-referenced matter, please find Kenosha Education Association's Brief in Opposition to Defendants Kenosha Unified School District and Kenosha Unified School District Board of Education's Motion to Dismiss Cross Claim and Affidavit of Joseph A. Kiriaki.

By copy of this letter, all parties are being served with the same by U.S. Mail.

Thank you for your consideration.

Sincerely,

CULLEN WESTON PINES & BACH LLP



Tamara B. Packard

TBP:hmm

Enclosures

cc: Joseph A. Kiriaki
Richard Esenberg
Nathan J. McGrath
JoAnn M. Hart
Joel S. Aziere

STATE EX REL. KRISTI LACROIX, *et al.*,

Plaintiffs,

Case No. 13-CV-1899

v.

REBECCA STEVENS, *et al.*,

Defendants.

**KENOSHA EDUCATION ASSOCIATION'S BRIEF IN OPPOSITION TO
DEFENDANTS KENOSHA UNIFIED SCHOOL DISTRICT AND
KENOSHA UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION'S
MOTION TO DISMISS CROSS CLAIM**

The motion to dismiss brought by the Kenosha Unified School District and its Board (collectively, the "District") should be denied. As shown below, the Kenosha Education Association ("KEA") substantially complied with the requirements of Wis. Stat. § 893.80(1d), and the District disallowed the claim before KEA brought its cross claim.

STATEMENT OF FACTS

KEA has been the collective bargaining agent for five bargaining units of District employees for many years. *Affidavit of Joseph A. Kiriaki ("Kiriaki Aff.")* ¶2. In the years prior to the 2013-2014 school year, the District deducted membership dues and fair share contributions (collectively referred to herein as "dues deductions") pursuant to the applicable collective bargaining agreements ("CBA's") between the District and

KEA. *Id.* ¶3. The relevant language from those CBA's is provided as Exhibits 1 through 5 to Mr. Kiriaki's Affidavit. *Id.* ¶4. The Executive Director of KEA, Joseph A. Kiriaki, spoke with Sheronda Glass, Executive Director of Business Services for the District, about continuing the parties' prior practice regarding dues deductions near the start of the 2013-2014 school year, and Ms. Glass agreed that the District would continue its past dues deductions practice. *Id.* ¶5. Ms. Glass confirmed that the District intended to continue to recognize the KEA as the representative for all of the KEA bargaining units on August 29, 2013. *Id.* ¶6. Mr. Kiriaki sent letters to the District's Accounting and Payroll Supervisor, Heather Kraeuter, enclosing lists itemizing the dues deduction amounts per paycheck requested for each KEA bargaining unit member on September 3, 2013, consistent with the practice of prior years. *Id.* ¶7.

The District did not, however, promptly follow past practices regarding dues deductions, which resulted in a series of communications between KEA and the District regarding the issue. *Id.* ¶8. Based on her meeting with the Board of the District on October 21, 2013, Ms. Glass verbally informed Mr. Kiriaki that the District would resume withholding union dues for all KEA groups starting again with the next pay period. *Id.* ¶¶9-10. Mr. Kiriaki confirmed this by email to her that morning, and clarified in an email to Ms. Glass the next day that KEA anticipated that the District would "resume payroll deductions of dues based on the method used to do so based on what the 2010-2013 contract[s] provided." *Id.* ¶10, *Exhibit 6*. Ms. Glass acknowledged that day that the District would "deduct dues based on current information provided from the union (names and dollar amounts)." *Id.* She also requested an updated roster providing

that information, and directed Mr. Kiriaki to send that list to District employees Tarik Hamdan and Heather Kraeuter. *Id.*

On October 25, 2013, Mr. Kiriaki emailed to Ms. Glass, Mr. Hamdan, Ms. Kraeuter and others the requested listing by individual name all KEA bargaining unit members (from all five units) and the amounts to be deducted from each of their paychecks beginning with the next pay period. *Id.* ¶11, *Exhibit 7*. In Mr. Kiriaki's October 25, 2013 email, he referred to a "recent court decision" that could not be ignored, referring to the October 21, 2013 ruling by Dane County Circuit Court Judge Colás enjoining the Wisconsin Employment Relations Commission from implementing or enforcing those portions of 2011 Act 10 that the Court had previously found facially unconstitutional. *Id.* ¶12. In that same email, Mr. Kiriaki informed Ms. Glass that if the District further delayed in resuming dues deductions, "KEA will pursue any and all legal actions needed to hold the District accountable to both the Circuit Court's decision and the School Board action including pursuing contempt of court judgments against individual District Administration and the School Board." *Id.*, *Exhibit 7*.

The District continued to delay withholding dues deductions and also delayed scheduling collective bargaining sessions, which resulted in Mr. Kiriaki demanding bargaining on October 21, 2013 and again on November 4, 2013. *Id.* ¶13. Collective bargaining negotiations were authorized by the District's Board on November 9, 2013. *Id.* ¶14. On November 11, 2013 KEA and the District reached a tentative agreement to extend the CBA's in place for 2011-2013 to 2013-2014 and again for 2014-2015, with no modifications made to the language of the provisions governing dues deductions. *Id.*

¶15, *Exhibits 1-5, 8*. All five KEA bargaining units and the District ratified the CBA's on November 12, 2013, and November 15, 2013 respectively. *Id.* ¶¶16-17.

Despite this ratification, on November 19, 2013, Ms. Glass, acting on behalf of the District, informed all District employees by email that regardless of the CBA's, the District would not deduct dues, including fair share contributions, without receiving individual permission from each employee. *Id.* ¶18, *Exhibit 9*. On December 5, 2013, Ms. Glass, acting on behalf of the District, again informed all District employees that the District would not be honoring the CBA's it ratified on November 15, 2013. *Id.* ¶19, *Exhibit 10*. On December 19, 2013, Mr. Kiriaki sent a letter by email to the President of the Board of the District, Rebecca Stevens, and to Ms. Glass, demanding immediate compliance with the previously ratified CBA's and threatening legal action otherwise. *Id.* ¶20, *Exhibit 11*. On December 20, 2013, the District advised all District Employees by email and attached memorandum from the District's Office of Human Resources that "the Board of Education has decided to move forward with the implementation of the collective bargaining agreements . . . except for the attached changes . . ." *Id.* ¶21, *Exhibit 12*. One of the changes attached was that "[f]air share will not be implemented. Union dues will only be deducted if you sign a voluntary deduction form." *Id.*

Within six months after the District disallowed KEA's claim, of which it had full notice, on April 14, 2014, KEA filed its cross claim in this action challenging the District's refusal to comply with the dues deductions provisions in the parties' CBA's.

ARGUMENT

I. INTRODUCTION.

A claim against a municipality is valid if it substantially complies with the requirements of Wis. Stat. §§ 893.80(1d)(a) and (b). *Thorp v. Town of Lebanon*, 2000 WI 60, ¶22, 235 Wis. 2d 610, 612 N.W.2d 59. The twin purposes of notice¹ “may be satisfied with substantial, rather than strict, compliance.” *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶88, 350 Wis. 2d 554, 835 N.W.2d 160. The Court should deny the District’s motion to dismiss KEA’s cross claim against it because KEA substantially complied with Wis. Stat. § 893.80(1d) and filed its cross claim in this matter only after the District disallowed the claim. The District’s brief ignores that fact that substantial, rather than strict, compliance with the notice requirements of Wis. Stat. § 893.80(1d) is sufficient.

Specifically, KEA substantially complied with Wis. Stat. §§ 893.80(1d)(a) and (b) through the letters sent to the District on September 3, 2013, October 25, 2013, and December 19, 2013. *Kiriaki Aff.* ¶¶7, 11-12, 20, *Exhibits 7 and 11*. The District disallowed the claim by repeatedly informing employees, including KEA’s bargaining unit members, that the District would not withhold dues deductions in accordance with the CBA’s and by its continued failure to resume dues deductions. *Id.* ¶¶18-19, 21, *Exhibits 9, 10, 12*. KEA therefore substantially complied with the notice requirements of Wis.

¹ These two purposes are “(1) to give 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.” *E-Z Roll Off*, 335 Wis.2d 720 ¶ 34.

Stat. § 893.80(1d), and did not file its cross claim until after the District denied its claim. Therefore, the Court should deny the motion to dismiss.

II. KEA SUBSTANTIALLY COMPLIED WITH THE NOTICE OF INJURY AND NOTICE OF CLAIM REQUIREMENTS.

A. Criteria for Substantial compliance.

Wisconsin Stat. §§ 893.80(1d)(a) and (b) includes several requirements that must be substantially complied with. Substantial compliance with Wis. Stat. § 893.80(1d)(a), the notice of injury provision, has two requirements: “(1) the governmental entity had actual notice of the claim, and (2) the governmental entity was not prejudiced by the claimant's failure to strictly comply.” *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶88, 350 Wis. 2d 554, 835 N.W.2d 160. Substantial compliance with Wis. Stat. § 893.80(1d)(b), the notice of claim provision, has four requirements: “[a] notice must 1) state a claimant’s address, 2) include an itemized statement of the relief sought, 3) be presented to the appropriate clerk, and 4) be disallowed by the governmental entity.”² *Thorp v. Town of Lebanon*, 2000 WI 60, ¶28, 235 Wis. 2d 610, 612 N.W.2d 59 (citations omitted). The two guiding principles for courts applying Wis. Stat. § 893.80(1d)(b) are that “[t]he notice must provide enough information to apprise a governmental entity of the budget it will need to set aside in case of litigation or settlement,” and “[t]he notice should also ‘be construed so as to preserve bona fide claims.’” *Id.* ¶28 (citations omitted).

² Substantial compliance with the requirement of presentation to the “appropriate clerk” only requires that “the notice was presented to a ‘proper representative.’” *Thorp*, 235 Wis. 2d 610 ¶31.

B. Facts Meeting Substantial Compliance.

The facts of *Thorp v. Town of Lebanon* illustrate what information must be transmitted by a claimant to the municipality to substantially comply with Wis. Stat. §§ 893.80(1d)(a) and (b). 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59. In that case, the Court found that a letter requesting the relief sought in the suit and describing the circumstances of the claim with specificity, in addition to repeatedly corresponding with the defendants and presenting grievances before them in person, satisfied Wis. Stat. § 893.80(1d)(a). *Id.* ¶¶25-27. The Court also held that the plaintiff had substantially complied with all four requirements of Wis. Stat. § 893.80(1d)(b). *Id.* ¶¶28-34: a letter sent to the municipality “contained the address of the Thorps' attorney,” an acceptable substitute for the claimant’s own address. *Id.* ¶29 (citation omitted). The specific information regarding the price and amount of plaintiffs’ land in dollars contained in the letter constituted “an itemized account of the relief sought” that allowed the municipality to budget for litigation or settlement. *Id.* ¶30. The city attorneys who received the notice were “proper representative[s]” of the municipality and the letter was additionally addressed to several municipal officials. *Id.* ¶¶31-32. The municipality disallowed the claim by refusing to rezone the land at issue, which was the relief requested. *Id.* ¶33.

The facts of *State Dep't of Natural Res. v. City of Waukesha* illustrate other circumstances in which a claimant substantially complied with Wis. Stat. §§ 893.80(1d)(b). 184 Wis. 2d 178, 515 N.W.2d 888 (1994) *abrogated on other grounds by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W.2d 587 (1996). The

Waukesha court closely analyzed all four requirements of Wis. Stat. § 893.80(1d)(b) and found that a letter sent by the plaintiff's attorney satisfied them all, in light of the court's duty to "preserve this otherwise bona fide claim." *Id.*, 184 Wis. 2d at 197-201. The first requirement was satisfied by the attorney's address in the letter. *Id.* at 198-99. There was an itemized statement of relief sought because the letter contained the dollar amounts necessary to remedy the dispute, the amounts were "as specific as possible," and the letter gave general information as to the relief sought. *Id.* at 199. The court found that submitting the letter to the city attorneys instead of the clerk satisfied the third requirement as the attorneys were "proper representative[s] of the city" who forwarded the information to relevant city officials. *Id.* at 199-200. The fourth requirement was satisfied because the municipality effectively disallowed the claim before the 120 day limit by failing to modify its conduct and repeatedly refusing to do so in several letters. *Id.* at 200-01.

Recent Wisconsin cases have continued to routinely find substantial compliance with Wis. Stat. § 893.80(1d) when facing facts similar to those here. The Wisconsin Supreme Court recently held that Wis. Stat. § 893.80(1d) is satisfied as long as the municipality is aware of the injury asserted, "the relief sought," and has "sufficient information to contact the claimants." *Bostco*, 350 Wis. 2d 554 ¶93. The *Bostco* court held that there was substantial compliance with the Wis. Stat. § 893.80(1d)(a) notice of injury provision because the defendant was informed of the nature of the alleged injury, giving the defendant the "ability to investigate and evaluate the nature of the claim." *Id.* ¶90. Likewise, the claimants in *Ecker Bros. v. Calumet Cnty.* were held to have

substantially complied with Wis. Stat. § 893.80(1d) when they sent several letters to the county discussing the specific issue at the center of the suit and the county refused to grant the relief they requested, even suggesting the that claimants confer with legal counsel. 2009 WI App 112, ¶¶7-9, 321 Wis. 2d 51, 772 N.W.2d 240.

Earlier Wisconsin cases also held that claimants had substantially complied with Wis. Stat. § 893.80(1d) in circumstances similar to those here. The claimants in *Providence Catholic Sch. v. Bristol Sch. Dist. No. 1* substantially complied with Wis. Stat. § 893.80(1d) by sending a letter from their attorney threatening legal action if the relief sought was not granted and waiting to sue until after months of “dispute over the proper interpretation of the statute” made it clear that the defendants had disallowed the claim. 231 Wis. 2d 159, 172-74, 605 N.W.2d 238 (Ct. App. 1999). The claimants in *State v. Town of Linn* complied with Wis. Stat. § 893.80(1d) because the defendants were aware of the legal dispute for “months before the complaint was filed” through meetings and letters between the parties. 205 Wis. 2d 426, 434-41, 556 N.W.2d 394 (Ct. App. 1996). These letters contained the address of the plaintiff, one letter specified the exact relief sought, the correspondence was forwarded to the key parties, and the defendants disallowed the notice of claim through their continued actions in defiance of plaintiffs’ demands in addition to their statements that they would not provide the relief requested. *Id.*, 205 Wis. 2d at 435-41.

C. KEA Substantially Complied with the Notice of Injury Provision.

Just like the plaintiffs in the cases discussed above, KEA substantially complied with both requirements of Wis. Stat. § 893.80(1d)(a). KEA's October 25, 2013 and December 19, 2013 letters to Sheronda Glass³ and other District representatives, including Board President Rebecca Stevens, demanding the resumption of dues deductions and immediate compliance with the CBA's while threatening legal action⁴ constituted actual notice.⁵ *Kiriaki Aff.* ¶¶11-12, 20, *Exhibits 7, 11*. These letters requested the relief now sought in KEA's cross claim and specifically described the circumstances that comprised KEA's grievance with the District, just as the letter in *Thorp* did. 235 Wis. 2d 610 ¶¶25-27. Thus, the requirement that the municipality have actual notice of the claim is met.

As to the second requirement, that the municipality experience no prejudice by the claimant's failure to strictly comply with the notice of claim statute, that is also met here. There has been no prejudice to the District, as "[m]erely being required to litigate, without more, does not demonstrate prejudice." *Bostco*, 350 Wis. 2d 554 ¶90. The District was aware of the legal dispute for months before the complaint was filed, just as the municipal parties in *Town of Linn* and *Providence Catholic Sch.* were. *Town of Linn*, 205

³ The duties of Ms. Glass include presenting Wis. Stat. § 893.80(1d) notices of claim to the District and recording such notices. *Affidavit of Sheronda Glass* ¶¶4-5. In fact, Ms. Glass assured KEA that she discussed KEA's concerns with the District's Board and it is apparent from her communications that she not only did so, but acted on direction from the Board on the issue. *Kiriaki Aff.* ¶¶10, 19, *Exhibits 6, 10*.

⁴ The letter in *Providence Catholic Sch.* also threatened legal action if the municipal party failed to grant the relief requested. 231 Wis. 2d at 173.

⁵ These letters and the District's response resemble the actions of the parties in *Ecker Bros.*, 321 Wis. 2d 51 ¶¶7-9.

Wis. 2d at 435-36; *Providence Catholic Sch.*, 231 Wis. 2d at 172-74. KEA therefore substantially complied with Wis. Stat. § 893.80(1d)(a).

D. KEA Substantially Complied with the Notice of Claim Provision.

KEA also substantially complied with all four requirements of Wis. Stat. § 893.80(1d)(b).

1. Claimant's address.

The letters sent on October 25, 2013 and December 19, 2013 contained the mailing address, telephone number, and facsimile number of the claimant, the Kenosha Education Association, as well as the email address of its Executive Director, Mr. Kiriaki. *Kiriaki Aff.* ¶¶11-12, 20, *Exhibits 7, 11*. Providing the claimant's address plainly satisfies Wis. Stat. § 893.80(1d)(b). *Town of Linn*, 205 Wis. 2d at 439.

2. Itemized statement of relief sought.

KEA's letters sent on September 3, 2013 and October 25, 2013 each contained an itemized list of relief sought. The letters each specified for each bargaining unit member the dollar amount that should be deducted and demanded the immediate resumption of dues deductions, which gave the District the necessary budgeting information to prepare for litigation or settlement. *Kiriaki Aff.* ¶¶7, 11-12, *Exhibit 7*. Providing the specific dollar amounts necessary to calculate the total relief sought is sufficient to substantially comply with Wis. Stat. § 893.80(1d)(b). *Thorp*, 235 Wis. 2d 610 ¶30. KEA's letters sent on September 3, 2013 and October 25, 2013 consequently satisfied this requirement as they gave dollar amounts that were "as specific as possible" and also

provided information as to the exact relief sought. *See Waukesha*, 184 Wis. 2d at 199; *Town of Linn*, 205 Wis. 2d at 439.

3. Presented to the appropriate clerk or proper representative.

KEA's letters sent on October 25, 2013 and December 19, 2013 were delivered to Ms. Glass and several other District representatives in accordance with Wis. Stat. § 893.80(1d)(b). *Kiriaki Aff.* ¶¶11-12, 20. Ms. Glass appears to serve as the clerk for the District for purposes of receiving notice under Wis. Stat. § 893.80(1d), and in any event is the "proper representative" of the District to receive notice as she forwards the relevant information on to other members of the District. *See Thorp*, 235 Wis. 2d 610 ¶¶31-32; *Waukesha*, 184 Wis. 2d at 199-200; *Town of Linn*, 205 Wis. 2d at 439-440. The President of the District's Board received the December 19 letter and also qualifies as a "proper representative" of the District under Wis. Stat. § 893.80(1d)(b). *See Town of Linn*, 205 Wis. 2d at 440.

4. Disallowed prior to bringing the claim in court.

Finally, the District's statements and actions disallowed the claim as required under Wis. Stat. § 893.80(1d)(b). The District informed all its employees on three separate occasions between November 19 and December 29, 2013 that it would not resume dues deductions, despite the terms in the parties' CBA's. *Kiriaki Aff.* ¶¶18-19, 21, *Exhibits 9, 10, 12*. The District followed through on these statements and never resumed dues deductions, failing to comply with the terms of the CBA's despite two letters from KEA dated October 25, 2013 and December 19, 2013 threatening legal action if the District did not do so. *Kiriaki Aff.* ¶¶ 12, 20, *Exhibits 7 and 11*. Outright refusal to grant

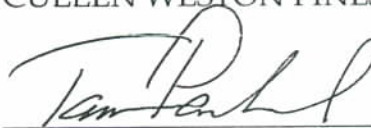
the relief requested constitutes disallowance of notice of the claim. *Thorp*, 235 Wis. 2d 610 ¶33. The District's repeated refusals to resume dues deduction mirror the refusals of the municipal party in *Waukesha*, as does the District's failure to change its conduct. *Waukesha*, 184 Wis. 2d at 200-01. The District's continued actions in defiance of KEA's demands constitute disallowance. See *Town of Linn*, 205 Wis. 2d at 440-41. Consequently the District disallowed the notice of claim before the 120 day period elapsed and KEA substantially complied with all the requirements of Wis. Stat. §§ 893.80(1d)(a) and (b).

III. CONCLUSION.

Courts are instructed to "construe claims so as to preserve bona fide claims for judicial adjudication, rather than cutting them off without a trial." *Bostco*, 350 Wis. 2d 554 ¶89; *Waukesha*, 184 Wis. 2d at 199. Here, KEA substantially complied with Wis. Stat. § 893.80(1d). It provided the District with both notice of injury and notice of claim, thus meeting the purposes behind the notice of claim statute. The District disallowed the claim through their continued explicit refusal in the face of repeated demands to resume dues deductions. It was only after this disallowance that KEA brought its cross claim in this litigation. The Court should therefore deny the District's motion.

Dated this 6th day of June, 2014.

CULLEN WESTON PINES & BACH LLP



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