STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 KENOSHA COUNTY

KRISTI LACROIX, et al.

Plaintiffs,

vs. Case No. 2013-CV-1899

REBECCA STEVENS, et al.

Defendants.

KENOSHA EDUCATION ASSOCIATION'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant Kenosha Education Association ("KEA") opposes Plaintiffs' Motion for Summary Judgment. Plaintiffs seek a declaration that all collective bargaining agreements between KEA and other labor union Defendants (collectively referred to as "Defendants") and the Kenosha Unified School District ("KUSD") negotiated and ratified in November 2013 are invalid. Plaintiffs have failed to provide the court with sufficient evidence to demonstrate even a prima facie claim for relief, and for that reason alone their motion should be denied. Moreover, as a matter of law, at the time the Collective Bargaining Agreements at issue were negotiated and agreed upon, the parties to those negotiations were vested with full authority to negotiate and enter into them, and to negotiate the specific terms therein, and thus they are entirely valid. For

the reasons shown below the court should deny Plaintiffs' Motion for Summary Judgment and instead grant summary judgment to KEA.

FACTS

In the Argument section below, KEA will discuss Plaintiffs' failure to provide the court with the evidence necessary to support their prima facie case. Plaintiffs' factual presentation also omits many facts which support KEA's position in this dispute. Those facts are provided below, and are supported by affidavits and other admissible evidence provided herewith.

2011 Act 10 and 2011 Act 32 (collectively "Act 10") amended the Wisconsin statutes governing public sector collective bargaining, including the Municipal Employment Relations Act, Wis. Stat. 111.70 et seq. ("MERA"). On August 18, 2011, Madison Teachers, Inc., its President Peggy Coyne, Public Employees Local 61, AFL-CIO (representing sanitation workers for the City of Milwaukee), and its business manager John Weigman, brought a lawsuit under Wisconsin's Declaratory Judgment Act against Governor Walker and the Commissioners of the Wisconsin Employment Relations Commission (WERC), in their official capacities. *Affidavit of Packard, Ex. 1.* The WERC is the state executive branch agency charged with interpretation, implementation, administration and enforcement of the public sector labor laws, including MERA. That matter was captioned *Madison Teachers, Inc., et al. v. Scott Walker, et al.,* Dane County Circuit Court Case No. 11CV3774, Hon. Juan Colás, presiding, and challenged the constitutionality of portions of Act 10 which amended MERA. The

defendants were represented by the Attorney General, who defended the constitutionality of the challenged provisions of Act 10 at all stages of the case.

On September 14, 2012, Judge Colás issued a Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings, declaring portions of Act 10 to be unconstitutional, null and void, and without effect ("9/14/12 Decision"). *Affidavit of Packard, Ex. 2.* Specifically relevant here, Judge Colás held the following portions of MERA applying to general employees and their unions (like the Defendants here) and school districts (like KUSD) unconstitutional on their face, null and void, and without effect:

- Wis. Stat. 111.70(1)(f) and (2), prohibiting "fair share" dues agreements;
- Wis. Stat. 111.70(3g), prohibiting payroll deduction of dues;
- Wis. Stat. 111.70(4)(mb), prohibiting collective bargaining on anything but "total base wages" and capping base wage increases to cost of living; and
- Wis. Stat. 111.70(4)(d)3., imposing annual recertification elections by a supermajority of 51% of all employees in the bargaining unit.

Affidavit of Packard, Ex. 2, 3.

Prior to Act 10, once certified, collective bargaining agents were not required to undertake annual recertification elections under MERA; agents remained certified until and unless decertified through an election called for by collective bargaining unit members and so voted upon. Prior to Act 10, there were very few prohibited subjects of bargaining under MERA, wage increases were not capped, and there was no ban on dues and fair share contribution deductions from wages. *See, e.g.,* Wis. Stat. §111.70, et seq. (2009-11).

There is sharp dispute in this case as to whether those portions of Act 10 declared facially unconstitutional, void and without effect on September 14, 2014 were somehow nevertheless in effect between that date and July 31, 2014, when the Wisconsin Supreme Court reversed the circuit court's decision. That is largely a legal dispute, but there are a number of facts about what the Defendants, courts, Commissioners, Governor and Attorney General did and did not do which bear on the resolution of that dispute. Those facts are outlined here.

The Commissioners and Governor, by and through the Attorney General, appealed the 9/14/12 Decision, and repeatedly sought to stay enforcement of the circuit court's ruling pending appeal. The circuit court denied those officials' motion to stay on October 22, 2012. *Affidavit of Packard, Ex. 4.* On March 12, 2013, the Wisconsin Court of Appeals likewise denied a motion to stay that ruling pending appeal. *Affidavit of Packard, Ex. 5.* The Court of Appeals did not decide the merits of the appeal, rather, it certified the appeal to the Wisconsin Supreme Court, and Certification was granted on June 14, 2013. *Affidavit of Packard, Ex. 6.* On October 25, 2013, the Attorney General, on behalf of the Commissioners and Governor filed with the Supreme Court an "Emergency Motion to Stay" enforcement of the 9/14/12 Decision. *Affidavit of Packard, Ex. 7.* On October 29, 2013, the Supreme Court declined to immediately rule on the motion to stay enforcement of the 9/14/12 Decision, and instead asked the parties to be prepared to address the motion at oral arguments set for November 11, 2013, which they did. *Affidavit of Packard, Ex. 8, ¶ 10.* The Court never stayed enforcement of the 9/14/12 Decision. On July 31, 2014, it reversed that decision. *Affidavit of Packard, Ex. 9.*

Despite the fact that the final judgment in Dane County Circuit Court Case No. 11CV3774 held Wis. Stat. § 111.70(4)(d)3. unconstitutional on its face, void, and without effect, and despite the fact that the circuit court's final judgment was not stayed pending appeal, the Governor and Commissioners, parties to that case, purported to promulgate emergency administrative rules implementing that provision, which mandated annual certification elections, including setting deadlines to petition for elections, scheduling such elections, and setting forth the procedure for conducting them (the "emergency rules"). The scope statement for the emergency rules was approved by the Governor on April 19, 2013 and approved by the WERC on June 3, 2013; the Governor approved the emergency rules on July 3, 2013. *Affidavit of Packard, Ex. 10, p. 1.*[1] These were the first acts by the State officials named as defendants in 11CV3744 that sought to implement any of the provisions voided and declared to be without effect by the 9/14/12 Decision.

In light of the WERC Commissioners' and Governor's actions, the original plaintiffs in 11CV3774 returned to the Dane County Circuit Court to seek injunctive relief, preventing further implementation of the unconstitutional provisions by the State officials named as defendants in that case. However, because the emergency rules did not purport to apply the unconstitutional provisions to those plaintiffs, and thus those plaintiffs did not face irreparable harm by the efforts to implement those provisions, on September 17, 2013, the circuit court found that it could not enjoin the defendants.

[1] Notably, the emergency rules explicitly did not apply to "the plaintiffs in Case 11CV3744 unless and until the Circuit Court's decision is no longer in effect." *Id., p. 2.*

Nevertheless, the court made it clear to the Commissioners and the Governor that "the defendants are bound by the court's judgment, even as to non-parties" and that they "may not enforce [the provisions found facially unconstitutional] under any circumstances, against anyone." *Affidavit of Packard, Ex. 11.*

Despite that clarification and admonishment, the Commissioners and the Governor did attempt to enforce the provisions found facially unconstitutional against those who were not parties in 11CV3774. In particular, the next day, on September 18, 2013, Peter Davis, general counsel for WERC, indicated publicly the agency's intention to enforce the recertification provisions of Act 10, and associated emergency rules, against those who were not parties in 11CV3774. *Affidavit of Pines, Ex. 1.*

This was particularly concerning to the Defendants in this case--Kenosha Education Association ("KEA"), SEIU Local 168 and AFSCME Local 2383--because under emergency rule ERC 70.03(7), if a labor organization did not pay for and request a recertification election by August 30, 2013, the union lost its status as certified collective bargaining agent and, at the request of a municipal employer, the WERC was required to issue a "notice of consequences" of this determination if, after offering the labor organization an opportunity to speak to the issue, the WERC reached that determination. That process had been initiated by the Kenosha Unified School District ("KUSD") on September 6, 2013 as to all of these Defendants when the KUSD requested "written notification from the WERC . . . that the Kenosha Education Association, SEIU and Local 2383 did not file petitions for recertification and will no longer be recognized as the agent of record here in Kenosha." *Affidavit of Pines, Ex. 2.* Applying the

emergency rule, the WERC provided these Defendants until September 23, 2013 to respond to the request. *Id.*

Thus, the WERC general counsel's statement that the WERC intended to enforce the unconstitutional provisions, despite the circuit court's clear mandate to the Commissioners and Governor not to, "under any circumstances, against anyone," put the Defendants in this case at risk of decertification. Indeed, even before receiving any response from these Defendants, chief legal counsel for WERC Peter Davis informed officials at the KUSD that KEA, having failed to submit a petition for recertification election by August 30, 2013, was decertified. Specifically, he stated in an email to KUSD officials:

> I have advised all who have inquired that per WERC administrative rules, the absence of a timely filed petition=loss of status as the collective bargaining representative as of 4:31 pm August 30.

Affidavit of Pines, Ex. 2.

In an effort to avoid further litigation, counsel for these Defendants and other unions wrote to the Commissioners to seek their compliance with the circuit court's orders to not enforce the invalid enactments against anyone. *Affidavit of Hawks, Ex. 1.* Unfortunately, that effort was rebuffed. *Affidavit of Hawks, Ex. 2.* Consequently, on September 24, 2013, the Defendants in this case along with other labor unions brought a motion in 11CV3774 pursuant to Wis. Stat. § 785.03(1)(a) to hold the Commissioners in contempt and for remedial sanctions.[2] *Affidavit of Packard, Ex. 12.*

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[2] The motion was brought by Wisconsin Education Association Council; AFT-Wisconsin, AFL-CIO; SEIU Healthcare Wisconsin, CTW, CLC; Wisconsin Federation of Nurses and Health Care Professionals, AFT, AFL-CIO; District Council 40, AFSCME, AFL-CIO, and Kenosha Education Association. Defendant SEIU

After briefing, a hearing was held on October 21, 2013 before the Honorable Judge Colás. In a ruling from the bench, the court enjoined the Commissioners "to bar them from doing or continuing to do what they ought not have done in the first place . . . . they may not enforce a law that has no legal existence against anyone." The court further held the Commissioners in contempt, allowing them to purge the contempt by ceasing to implement "any of the provisions that this court found unconstitutional anywhere in the state against anyone." *Affidavit of Packard, Ex. 13, p. 53.* Counsel for the Commissioners assured the court that they would comply with the court's ruling, by whatever means were necessary. *Id., pp. 54-55.* The court explained that the Commissioners were to both cease all efforts "to implement the provisions that I declared unconstitutional last year . . . and to the extent that they need to be reversed, be reversed." *Id., p. 55.* As to WERC general counsel's communication to Defendant KEA and the KUSD indicating that KEA was decertified, the Commissioners disavowed that WERC had in fact decertified the union. *Id., pp. 60-61.* Nevertheless, the court ordered the Commissioners to send a letter withdrawing its earlier communications making such suggestions. *Id., pp. 63-64.*

Judge Colás's written Order Granting Motion to Hold Defendants James R. Scott and Rodney G. Pasch in Contempt of Court and for Remedial Sanctions was entered four days later ("10/25/13 Order"). *Affidavit of Packard, Ex. 14.* That order (1) held the Commissioners in contempt by their refusal to comply with the 9/14/12 Decision, (2)

Local 168 and SEIU Healthcare of Wisconsin are both subsidiaries of SEIU. Defendant AFSCME Local 2383 is a member of District Council 40, AFSCME, AFL-CIO.

directed the Commissioners to "cease enforcement of those parts of 2011 Wisconsin Act 10 and Wisconsin Act 32 which the Court declared in its September 14, 2012 decision and order to be unconstitutional," *id., p. 2,* and (3) allowed the Commissioners to purge their contempt by, among other things, taking the following actions and inactions:

- Cease and desist from their refusal to comply with the 9/14/12 Decision;
- Cease and desist from implementing the emergency rules for administration of annual certification elections;
- Inform the public and interested parties through posting on the WERC website that "Wis. Adm. Code ECR 70.03 was enacted without lawful authority and was therefore void when enacted, has no legal effect and will not be implemented or enforced so long as the" 9/14/12 Decision "remains in effect;"
- Accord labor organizations the "same status with respect to municipal employer that they would have had if ECR 70.03 had not been adopted;"
- Immediately inform the KUSD that WERC's chief legal counsel's prior communications "with respect to the status of the Kenosha Education Association were in error and are withdrawn and affirmatively inform the KUSD that the Kenosha Education Association has the same status it would have had ECR 70.03 not been enacted and had the withdrawn communications not been sent;" and
- Take no further steps of any kind to implement ECR 70.03.

Id.

While the Commissioners appealed the 10/25/13 Order, they chose at the same time to purge their contempt, though they could have chosen not to. To do so, on October 21, 2013, by its chief legal counsel, the WERC informed the KUSD and Defendant KEA that "the Commission's emergency administrative rules as to certification elections are, at the present time, null and void. Thus, at the present time,

my prior emails to you and the District as to the impact of those rules on a union that did not file a certification are withdrawn." *Affidavit of Pines, Ex. 3.* It reiterated this message in an October 27, 2013 communication to KUSD and Defendant KEA, and affirmatively informed the KUSD "that the Kenosha Education Association has the same status it would have had had ERC 70.03 not been enacted and had the withdrawn communications not been sent." *Id.* Further, the Commissioners posted a notice on the WERC website on October 26, 2013 informing the public and all interested parties that "Wis. Adm. Code ERC 70.03 was enacted without lawful authority and was therefore void when enacted, has no legal effect, and will not be implemented or enforced so long as the Decision and Order of the Dane County Circuit Court dated September 14, 2012 remains in effect." This notice also informed the public and interested parties that "labor organizations are to be accorded the same status with respect to municipal employers that they would have had if ERC 70.03 had not been adopted."[3] *Affidavit of Packard, Ex. 15.*

On October 28, 2013, the Wisconsin Court of Appeals denied a request from the Commissioners for temporary ex parte relief in the form of a stay of the effect of the 10/25/13 Order. *Affidavit of Packard, Ex. 16.* At the same time they sought a stay of the 10/25/13 Order from the Court of Appeals, the Commissioners also sought a stay from the Wisconsin Supreme Court. On October 29, the Supreme Court announced it would

[3] This court inquired at the September 5, 2014 hearing whether the WERC singled out KEA in application of its retraction of the applicability of its efforts to implement Act 10. The notice on its website, addressed to the public and all interested parties, demonstrates that the WERC's retraction was intended to be broadly applied to all municipalities and the unions of municipal employees. Moreover, the WERC additionally specifically addressed KEA in its retraction of any decertification and confirmation of its certified status.

take no action on that motion, but advised that if requested, it would take up the matter of a stay of the 10/25/13 Order at the oral arguments scheduled for November 11, 2013. *Affidavit of Packard, Ex. 8.* On November 4, 2013, after expedited briefing, the Court of Appeals denied the Commissioners' motion to stay enforcement of the 10/25/13 Order until it decided the merits of the appeal of that order. *Affidavit of Packard, Ex. 17.* On November 5, the Commissioners asked the Supreme Court to not only take up the matter of the requested stay of the 10/25/13 Order, but also asked that the Court provide "immediate relief" from both the 9/14/12 Decision and 10/25/13 Order, before the arguments on November 11. *Affidavit of Packard, Ex. 18.* No "immediate relief" was granted, and the arguments were held as scheduled on November 11. *Affidavit of Packard, ¶ 10.*

Also on November 11, 2013, KEA and KUSD reached and signed a tentative agreement on terms for Collective Bargaining Agreements for all of KEA's bargaining units and the bargaining units for the other Defendants for the periods July 1, 2013 through June 30, 2014 and July 1, 2014 through June 30, 2015. *Affidavit of Kiriaki, ¶ 3; Affidavit of McGrath, Ex. G.* Defendant KEA participated in the negotiations and reached the Tentative Agreement with KUSD in light of and in full reliance on the WERC's public acknowledgement that emergency rule ERC 70.03 "was enacted without lawful authority and was therefore void when enacted, had no legal effect, and will not be implemented or enforced." *Affidavit of Packard, Ex. 15; Affidavit of Kiriaki, ¶ 4.* Defendant KEA's participation in negotiations and the tentative agreement also occurred in light of and in full reliance on the WERC's retraction of any expression of decertification of KEA

as the bargaining agent for employees of the KUSD and affirmation that KEA's status was unaffected by void emergency rule ERC 70.03. *Affidavit of Kiriaki,* ¶ *5.* Finally, KEA reached the terms of the 2013-2014 and 2014-2015 agreements in reliance on the declaration set forth in the 9/14/12 Decision that Wis. Stat. §§ 111.70(1)(f), (2), (3g), (4)(mb), and (4)(d)3, as amended or created by Act 10, were facially unconstitutional, null and void, and without effect, and the directive in the 10/25/13 Order to the Commissioners and Governor to "cease enforcement of those parts of 2011 Wisconsin Act 10 and Wisconsin Act 32 which the Court declared in its September 14, 2012 decision and order to be unconstitutional." *Affidavit of Kiriaki,* ¶ *6; Affidavit of Packard, Ex. 14, p. 2.*

On November 12, 2013, each of Defendant KEA's bargaining units ratified the Collective Bargaining Agreements described in the tentative agreement attached as Exhibit G to the McGrath Affidavit. *Affidavit of Kiriaki,* ¶ *7.* On November 15, 2013, KUSD ratified all of the Collective Bargaining Agreements with KEA described in the tentative agreement attached as Exhibit G to the McGrath Affidavit. *Affidavit of Kiriaki,* ¶ *8.*

Throughout this time, between October 25, 2013 and until well after KEA and KUSD ratified the Collective Bargaining Agreements challenged in this lawsuit, the 9/14/12 Decision and the 10/25/13 Order remained in full force and effect, despite numerous and repeated efforts by the Commissioners and the Governor to stay them while they were appealed. The Wisconsin Supreme Court ultimately vacated the 10/25/13 Order on November 21, 2013 in a *per curiam* order. *Affidavit of Packard, Ex. 19.*

In that same order, however, it declined to stay the 9/14/12 Decision while it considered the merits appeal. *Id., p. 2.* It reversed the 9/14/12 Decision in an opinion dated July 31, 2014.

ARGUMENT

Plaintiffs devote a substantial portion of their brief to argue a matter that was decided on July 31, 2014 by the Wisconsin Supreme Court—the constitutionality of Act 10. While it is true that Act 10 was found constitutional on that date, that is irrelevant to the question before this court. The question before this court is of the validity of collective bargaining agreements reached during the "window" of time after a circuit court issued a declaratory judgment finding certain portions of Act 10 facially unconstitutional, void, and without effect—i.e., not law at all--and prior to the Supreme Court's ruling on July 31, 2014 finding that Act constitutional, prior to any decertification of the Defendants, and during a time that enforcement of the relevant portions of Act 10 was enjoined, and in full reliance on all of these legal facts and actions.

As shown in Section III.A below, it is black letter law that once statutes are declared to be facially unconstitutional, they have no effect, unless and until such declaration is reversed or narrowed by a higher court. Moreover, as shown in Section III.B below, actions taken in reliance on a judgment are protected from retroactive invalidity, even when that judgment is later found to be erroneous. A similar legal principle prevents retroactive invalidity of contracts by operation of legislation, and thus any argument that the contracts are invalid because emergency rule ERC 70.03 was

used to retroactively decertify these Defendants long after the contracts were negotiated and ratified, must fail, as shown in Section III.C below.

Yet this court need not reach those substantive questions at all. The well-known standards for summary judgment, described in Section I, are not met. Specifically, as shown in Section II, Plaintiffs have failed to demonstrate a prima facie case for summary judgment by failing to demonstrate the existence of facts, through admissible evidence, essential to their case.

I. STANDARDS FOR SUMMARY JUDGMENT.

Summary judgment is appropriate where, based on evidence admissible at trial and provided to the Court, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2); *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Before a court may reach the legal issues presented in a motion for summary judgment, it must first examine the pleadings to determine that a claim for relief is stated and a genuine issue of material fact is presented. *Giffin v. Poetzl*, 2001 WI App 207, ¶ 6, 247 Wis. 2d 906, 634 N.W.2d 901. If that hurdle is met, the court must next examine the moving party's affidavits to determine whether a prima facie case for summary judgment has been made. *Schultz v Industrial Coils, Inc.*, 125 Wis. 2d 520, 521, 373 N.W.2d 74 (Ct. App. 1985). "[I]t is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" *Holsen v. Heritage Mut. Ins. Co.*, 182 Wis. 2d 457, 461-62, 513 N.W.2d 690

(Ct. App. 1994) (internal citations omitted). That showing must be made by submitting evidentiary material "'set[ting] forth specific facts,' Rule 802.08(3), Stats., material to that element." *Id.*

It is only after the moving party has made such a showing that the court turns to the opposing party's evidence to determine whether a genuine factual issue exists which would entitle that party to a trial. *Wolski v. Wilson*, 174 Wis. 2d 533, 537, 497 N.W.2d 794 (Ct. App. 1993). In this portion of the analysis, doubts regarding the existence of a genuine issue of material fact are resolved against the moving party. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751. When, and only when, all of these hurdles have been surmounted and the court finds that material facts are not in dispute, the court applies controlling law to the undisputed facts. *Stone v. Board of Regents*, 2007 WI App 223, ¶ 9, 305 Wis. 2d 679, 741 N.W.2d 774.

Thus, the court must (1) determine from the pleadings that a claim for relief has been stated and a genuine issue of material facts is presented; (2) determine that the moving party has presented through admissible evidence a prima facie case; and (3) determine that there is no genuine issue as to any material fact; before reaching the legal issues presented in a motion for summary judgment. If the court determines that the legal issues should resolve in favor of the non-moving party, it may grant summary judgment to the non-moving party, even though that party has not so moved. *M&I Marshall Bank v. Town of Somers*, 141 Wis. 2d 271, 285, 414 N.W.2d 824 (1987); Wis. Stat. § 802.08(6).

II. PLAINTIFFS FAIL TO MAKE A PRIMA FACIE CASE FOR SUMMARY JUDGMENT.

Plaintiffs' Motion for Summary Judgment states that it seeks by summary judgment a declaration that "the collective bargaining agreements [KEA] negotiated and entered into with the Kenosha School District in November, 2013 are void as a matter of law." Essential to such relief, as an element of the prima facie case, is proof of the existence and terms of such agreements. Plaintiffs utterly fail to present such evidence. Consequently, the court has at best incomplete evidence of the collective bargaining agreements challenged. It therefore cannot proceed to the next steps in the summary judgment process: determining whether a genuine factual issue exists which would entitle the non-moving party to a trial, and, in the absence of such factual dispute, determining whether either party has shown a basis for summary judgment as a matter of law.

Specifically, the only evidence of any portion of the terms of the contracts negotiated and entered into between KEA and KUSD in November 2013 is the "Tentative Agreement" attached as Exhibit G to the McGrath Affidavit. That document is signed by representatives of KSUD and the Defendants, including KEA, but does not reflect the full terms of the agreements between KEA and KUSD. Rather, the parties' agreement was to use the terms of their various 2011-2013 Collective Bargaining Agreements as the starting point for the CBA's for July 1, 2013 through June 30, 2014, and for the CBA's for June 1, 2014 through June 30, 2015, and for those CBA's to contain the same terms as the 2011-2013 CBA's except as modified in the Tentative Agreement.

That is, the terms of the new agreements are reflected in the various 2011-2013 Collective Bargaining Agreements, as modified by the November 2013 Tentative Agreement. This process created more than three new CBAs. *Second Amended Complaint, ¶ 57, KEA Amended Answer to Second Amended Complaint, ¶ 57.* None of those CBA's have been presented in admissible form.

As stated in its Amended Answer to Plaintiffs' Second Amended Complaint, paragraph 18, KEA is the collective bargaining agent for five (5) different bargaining units: (1) all regular full-time and all regular part-time certified teaching personnel employed by the School District, (2) all regular full-time and regular part-time Education Support Professionals employed by the School District, (3) all substitute teachers employed by the School District, (4) all regular licensed full-time and part-time educational interpreters employed by the School District, and (5) all carpenters and painters employed by the School District. For the 2011-2013 term, each of these bargaining units had separate contracts. *Affidavit of Kiriaki, ¶ 2.* Plaintiffs have failed to present admissible evidence of the terms of these various bargaining units' 2011-2013 Collective Bargaining Agreements, which comprise in substantial part the terms of the contracts that Plaintiffs challenge in this lawsuit.

At most, Plaintiffs have presented as Exhibit E to McGrath's Affidavit a document that KEA admits is "genuine," and which McGrath contends is "the 2011-2013 contract between the Kenosha School District and KEA." *Affidavit of McGrath, ¶ 6.* Mr. McGrath's affidavit presents no evidence that the assertion is based on his personal knowledge, and indeed KEA denied the assertion in the pleadings. *KEA's Amended*

Answer to the Second Amended Complaint, ¶ 58. Moreover, in their brief, Plaintiffs differently contended that this document is "the expired collective bargaining agreement" "between the School District and the Union Defendants," *Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 4,* which is contrary to Mr. McGrath's affidavit, unsupported by any evidence, and untrue. At most, this is one of the five different 2011-2013 contracts negotiated between KEA and KUSD: KEA negotiated a separate contract for each of the five collective bargaining units it represented at that time. *Affidavit of Kiriaki, ¶ 2.* Which one it is, if any, is not presented by evidence in admissible form, and there can be no dispute that there is no sign in the record of the remaining four contracts.

In sum, Plaintiffs ask the court to declare void contracts, the complete terms of which are not before the court. As outlined in Section I above, Plaintiffs bear the burden to prove a prima facie case for summary judgment by presenting the court with admissible evidence on each element essential to their case. They have utterly failed in that burden. Therefore, the court cannot move on to the next steps in the summary judgment. Instead, Plaintiffs' Motion for Summary Judgment must be denied.

III. THE CHALLENGED COLLECTIVE BARGAINING AGREEMENTS ARE VALID AS A MATTER OF LAW.

A. The Dane County Circuit Court's 9/14/12 Decision Had the Effect of an Injunction, Thus the Terms of the CBAs at Issue Are Valid.

A declaratory judgment action challenging the constitutionality of a state statute is properly brought against the state agency or officials charged with its administration.

Lister v. Board of Regents, 72 Wis.2d 282, 303, 240 N.W.2d 610 (1976). Such an action is brought against the officer or agency charged with administering the statute on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority by enforcing or implementing the law. *Id.* That was exactly the premise of the action brought in Dane County Circuit Court Case No. 11CV3774, and precisely why the plaintiffs there sued the WERC Commissioners and the Governor.

"[A] law repugnant to the Constitution is void." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 13, 307 Wis. 2d 1, 745 N.W.2d 1. "A legislative act that has been ruled unconstitutional has no legal effect or existence." *Hunter v. School Dist. Gale-Ettrick-Trempealeau*, 97 Wis. 2d 435, 444, 293 N.W.2d 515 (1980). "An unconstitutional act of the Legislature is not a law; it confers no rights, it imposes no penalties, it affords no protection, and is not operative, and in legal contemplation it has no existence." *State ex rel. Kleist v. Donald,* 164 Wis. 545, 552-53, 160 N.W. 1067 (1917). Particularly when, as in the 9/14/12 Decision, a court determines that a statute facially intrudes on free-speech rights, third persons, as well as those who are parties to the case, are entitled to rely on that determination unless and until it is stayed, reversed or overruled. *See Lounge Mgmt., Ltd. v. Town of Trenton,* 219 Wis. 2d 13, 22-23, ¶¶ 15-16, 580 N.W.2d 156 (1998).

Declaratory relief, like an injunction, "is primarily anticipatory and preventative in nature." *Lister v. Board of Regents,* 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976). Even when the relief is only declaratory, "the declaratory relief alone has virtually the same

practical impact as a formal injunction would." *Samuels v. Mackell,* 401 U.S. 66, 72 (1971).

No explicit injunction was necessary to halt all ability to rely on the provisions found unconstitutional. "If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application. . ." *State v. Konrath,* 218 Wis. 2d 290, 304, n. 13, 577 N.W.2d 601 (1998); *see also Hunter v. School Dist. Gale-Ettrick-Tremealeau,* 97 Wis. 2d 435, 293 N.W.2d 515 ("A legislative act that has been ruled unconstitutional has no legal effect or existence."). Moreover, when a *facial* constitutional challenge to a statute is made under the Declaratory Judgment Act, a decision in favor of the challenger directly affects ALL of those subject to the statute, regardless of whether they participated in the litigation. *Helgeland v. Wisconsin Municipalities,* 2006 WI App 216, ¶¶ 17, 19, 296 Wis. 2d 880, 724 N.W.2d 208, *aff'd,* 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. As the Wisconsin Supreme Court stated in *Helgeland*: "[O]n a practical level--the level at which our analysis must focus--the municipalities [who were not parties] arguably may be affected if a judgment is entered against DETF." *Helgeland,* 2008 WI 9, ¶ 58. Even the dissent, authored by Justice Prosser, agreed: "As 'a practical matter,' this suit is equivalent to a class action." *Helgeland,* 2008 WI 9, ¶ 167.

The Attorney General represented the State defendants and asserted the constitutionality of the challenged portions of Act 10 at every stage of the *Madison Teachers* litigation. Both WERC and the Attorney General "are charged by law with the duty to defend the constitutionality of" Act 10. *See Helgeland v. Wisconsin Municipalities,*

2008 WI 9, ¶ 91, 307 Wis. 2d 1, 745 N.W.2d 1; *White House Milk Co. v. Thomson,* 275 Wis. 243, 247, 81 N.W.2d 725 (1957). When the Attorney General defends a statute against a claim of unconstitutionality, he is acting in a representative capacity in behalf of *all* persons having an interest in upholding the validity of the statute under attack. *White Horse Milk,* at 247. His representation extends to citizens and political subdivisions of the state alike. *Helgeland,* at ¶ 91. "The obligation of both the [Attorney General] and public officers charged with the enforcement of state statutes [here WERC] is clear: they must defend the statute regardless of whether they have diverse constituencies with diverse views." *Id.,* at ¶ 108.

If the circuit court finds a state statute unconstitutional, the Attorney General is under a positive duty to appeal from that decision:

> [W]e cannot conceive of the attorney general failing to perform his duty of appealing, if the trial court should adjudge [the statute] unconstitutional. The issue of the validity of such statute is of such state-wide concern that he would be derelict in his duty if he did not appeal an adverse judgment. We must presume that he will perform his duty until such time as we are presented with convincing evidence to the contrary.

White Horse Milk, at 250.

The Supreme Court has relied on these principles to harmonize two facially incompatible parts of § 806.04(11). On the one hand, that provision makes clear that declaratory relief is available to challenge the constitutionality or validity of a statute or ordinance, as long as the Attorney General is "served with a copy of the proceeding and . . . entitled to be heard." On the other hand, it also commands that "all persons shall be

made parties who have or claim an interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding."

In *White Horse Milk,* the Supreme Court concluded that, because the Attorney General and the relevant officials act in a representative capacity, § 806.04(11) does not require "the joinder as parties, in a declaratory action to determine the validity of a statute or ordinance, of any persons other than the public officers charged with the enforcement of the challenged statute or ordinance." *White Horse Milk,* at 249, *quoted in Helgeland,* at ¶ 140. Otherwise, "the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly affect the interests of large numbers of people." *Town of Blooming Grove v. City of Madison,* 275 Wis. 328, 334, 81 N.W.2d 713 (1957), *quoted in Helgeland,* at ¶ 140.

Thus, in the absence of a stay or other subsequent order, as of September 14, 2012, those portions of Act 10 declared unconstitutional had no legal effect, and could not limit municipalities and collective bargaining agents as to the terms negotiated in their CBA's.

To the extent there was any actual confusion about what authority the WERC had and did not have to implement the nullified portions of MERA, the circuit court clarified that in its September 17, 2013 Decision and Order, saying that "the defendants are bound by the court's judgment, even as to non-parties." and that they "may not enforce [the provisions found facially unconstitutional] under any circumstances, against anyone." *Affidavit of Packard, Ex. 11.* That clarification should have stopped the

WERC from continuing to implement the voided statutes. While no injunction was necessary, that clarification, as well as the October 25, 2013 Order commanding the Commissioners to cease all implementation and enforcement of the nullified provisions, eliminated all question as to whether the Defendants and KUSD could bargain as they had prior to enactment of the voided provisions of Act 10. If the window to bargain without the restraints of the voided provisions of Act 10 was not open before October 25, 2013, it most certainly was open by that date, and remained open until after the challenged contracts were ratified on November 15, 2013, indeed until July 31, 2014, when the Supreme Court reversed.

B. The Unions and KUSD Were Entitled to Rely on the 9/14/12 Judgment Declaring the Relevant Parts of Act 10 Unconstitutional in Negotiating the CBAs in November 2013.

As an alternative and separate basis for confirming the validity of the Collective Bargaining Agreements negotiated between KEA and KUSD on November 11, 2013 and fully ratified on November 15, 2013, the CBA's were made in reliance on the judgment of a court, specifically, the 9/14/12 Decision finding relevant portions of Act 10 to be facially unconstitutional, void, and without effect.

Plaintiffs devote substantial efforts to argue that the circuit court's 9/14/12 Decision and 10/25/13 Order are "nonprecedential." This is true, and irrelevant. "Precedent" is not the question. Rather, the question is what effect those circuit court rulings have, until and unless stayed or reversed, on the ability of others to negotiate contracts and otherwise conduct their behavior in reliance on those rulings. The

answer, as shown below, is that actions taken in reliance upon a judgment are protected from interference, even if that judgment is later found to be erroneous.

In particular, the Wisconsin Supreme Court held in *Slabosheske v. Chikowske,* 273 Wis. 144, 150, 77 N.W.2d 497 (1956), that "when a court has jurisdiction of the parties and the subject matter its judgment, however erroneous, is a complete justification, until reversed or set aside, of acts done in its enforcement and *a protection to those who acted in good faith upon it.*" (emphasis added). Those protected by reliance on a circuit court's judgment, even if later determined erroneous, include nonparties: *Slabosheske* was an action on a promissory note. The note was taken by a school district, District 7, after a circuit court confirmed a referendum and determined that it, and not District 2, was the valid school district. Slabosheske was not a party in that case, captioned *State ex rel. Oelke v. Doepke.* The circuit court's decision in *State ex rel. Oelke* was reversed on appeal, but while that appeal was pending, District 7, relying on the circuit court's judgment borrowed money from Slabosheske. The Supreme Court rejected the argument that the borrowing of money by District 7 created no legal obligation to Slabosheske because of the later appellate ruling. Instead, it held: "until we reversed the trial court in *State ex rel. Oelke v. Dopeke, supra,* the judgment confirming the referendum, for the protection of those acting in reliance upon it, must be considered effective until reversed. . . .Those who dealt with the district in reliance upon its apparent status, such as the plaintiffs, are protected by the circuit court judgment." *Id.* at 152-153.

Slabosheske's holding was reaffirmed in *Kett v. Cmty. Credit Plan, Inc.,* 222 Wis. 2d 117, 586 N.W.2d 68 (Ct. App. 1998) *aff'd,* 228 Wis. 2d 1, 596 N.W.2d 786 (1999). There,

the court cited *Slabosheske* for the proposition that "[a] voidable judgment, [as opposed to a void judgment], *has the same effect and force as a valid judgment* until it has been set aside," and that judgment "protects actions taken under it before it is reversed." *Kett*, 222 Wis. 2d at 127-28 (emphasis added). Applying that case law, the ruling finding portions of Act 10 to be facially unconstitutional was valid until it was reversed. *See also In re the Marriage of Harris*, 141 Wis. 2d 569, 585, 415 N.W.2d 586, 593 (Ct. App. 1987).

There can be no question that the circuit courts of Wisconsin have the authority to declare statutes unconstitutional; such rulings are not merely advisory. "[D]etermination of constitutionality reasonably cannot abide initial adjudication by the appellate court. . ." *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 466 N.W.2d 861 (1991); *see also Just v. Marinette County*, 56 Wis. 2d 7, 26, 201 N.W.2d 761 (1972). Therefore the parties to the CBA's at issue had every right in November 2013 to rely on the September 2012 ruling that found the relevant portions of Act 10 to be void and without effect, particularly in light of the September 2013 clarification of the meaning of that ruling and the October 2013 directives to the Commissioners.

Taken together, *Slabosheske*, *Harris* and *Kett* confirm the validity of the 2013-2014 and 2014-2015 CBA's between KEA and KUSD challenged in this action. They were negotiated and ratified in reliance upon a valid judgment that portions of Act 10 were unconstitutional. Although that judgment was later found to be erroneous, under *Slabosheske* and *Kett*, any actions taken in reliance on that judgment are protected.

C. KEA was a Certified Bargaining Agent, Duly Authorized to Negotiate CBA's With KUSD: Legislation Retroactively Divesting It of Its Authority Cannot Invalidate the CBA's.

Plaintiffs have presented no evidence that KEA was decertified prior to the dates in November 2013 when it and KUSD negotiated and ratified the challenged CBA's. Indeed, the only evidence before the court is that KEA and KUSD relied on the WERC's own pronouncements of its lack of authority to enforce and implement the invalidated recertification provisions in Act 10 following the October 21, 2013 hearing, and its invalidation of emergency rule ERC 70.03. Specifically, on October 26, 2013, the WERC notified the public and all interested parties that its emergency rule "Wis. Adm. Code ERC 70.03 was enacted without lawful authority and was therefore void when enacted, has no legal effect, and will not be implemented or enforced so long as the Decision and Order of the Dane County Circuit Court dated September 14, 2012 remains in effect." This notice also informed the public and interested parties that "labor organizations are to be accorded the same status with respect to municipal employers that they would have had if ERC 70.03 had not been adopted." *Affidavit of Packard, Ex. 15.*

Moreover, specific as to KEA's certification status, in late October 2013 the WERC (1) disavowed that it had decertified KEA prior to the October 21, 2013 hearing, *Affidavit of Packard, Ex. 13, pp. 60-61;* (2) explicitly told KEA and KUSD that "the Commission's emergency administrative rules as to certification elections are, at the present time, null and void," *Affidavit of Pines, Ex. 3,* (3) withdrew prior communications implying that KEA had been decertified, *id.*; and (4) told KUSD and KEA that "the Kenosha Education

Association has the same status it would have had had ERC 70.03 not been enacted and had the withdrawn communications not been sent." *Id.*

Plaintiffs may assert that regardless of what had occurred as of the date the CBA's were negotiated and ratified, KEA was decertified on February 5, 2014, retroactive to August 31, 2013, through retroactive application of emergency rule ERC 70.03 and the Notice of Consequences dated February 5, 2014, and therefore the contracts reached in November 2013 are invalidated. The problem with that assertion is that a retroactive decertification and invalidation of contracts valid when entered into, by operation of a legislative act like emergency rule ERC 70.03, cannot be effective. Such invalidation runs afoul of the doctrine of legislative impairment of contract.

This doctrine, based on the Contract Clauses of both the Wisconsin and United States Constitutions (Article I, Sec. 12 and Article I, Sec. 10, respectively) invalidates legislative acts to the extent they substantially impair existing contracts, absent "significant and legitimate public purpose" behind the regulation, and a finding that the interference is a reasonable and narrowly tailored means of promoting the public purpose behind the regulation. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-413 (1983); *see also Pfister v. Milwaukee Econ. Dev. Corp.*, 216 Wis. 2d 243, 260-61, 576 N.W.2d 554, 560 (Ct. App. 1998). The severity of interference increases the level of scrutiny, such that total invalidation merits the highest level of scrutiny. *Id.* No public purpose has or can be shown significant enough to support the total invalidation proposed by Plaintiffs here, nor can it be demonstrated that the regulation is narrowly tailored to promote the public purpose asserted to be behind the regulation. For those

reasons, the court should find that emergency rule ERC 70.03 cannot be found to invalidate the collective bargaining agreements challenged by the Plaintiffs here.

IV. THE PLAINTIFFS HAVE NEITHER PLED NOR SHOWN A COLORABLE ANTITRUST CLAIM UNDER CHAPTER 133 AND THEREFORE HAVE NO CLAIM FOR ATTORNEY FEES.

The sum and substance of this lawsuit is the Plaintiffs' effort to have the 2013-2014 and 2014-2015 collective bargaining agreements covering District employees declared invalid and enjoined as in violation of Act 10, which Judge Colás had declared unconstitutional in 11CV3774. That decision has been reversed, but long after these contracts were ratified and therefore, as shown above, the contracts should not be invalidated. Even if this court should rule for the Plaintiffs on that issue and grants the declaratory and injunctive relief, Plaintiffs do not have a claim for attorney fees under the Declaratory Judgment Act. *See Gorton v. Hostak, Heinzl & Bichler, S.C.*, 217 Wis. 2d 493, ¶ 33, 577 N.W.2d 617 (1998); *Cobb v. Milwaukee County*, 60 Wis. 2d 99, 119-20 (1973); *Lenhardt v. Lenhardt*, 2000 WI App 201, ¶ 15, 238 Wis. 2d 535, 618 N.W.2d 218. Consequently, it is obvious that they have inserted an antitrust claim under Wis. Stat. § 133.03 into their complaint simply because Wis. Stat. § 133.18(1) provides for fee awards in antitrust cases. To demonstrate a violation of § 133.03, which is analogous to § 1 of the federal Sherman Act, a plaintiff must prove (1) the existence of a conspiracy, combination or contract; (2) that results in the unreasonable restraint of trade in a relevant market; and (3) the existence of an "anti-trust injury." *Agnew v. National*

Collegiate Athletic Association, 683 F.3d 328, 335 (7th Cir. 2012). Plaintiffs have come nowhere near to proving these elements.

No court has ever held that unions and employers violate the antitrust laws simply by entering collective bargaining agreements, yet that is what the Plaintiffs ask this court to do, so that they can dun the Unions for their attorney fees. Simply contracting collectively with an employer over its employees' wages, hours and conditions of employment is not and has never been an antitrust violation. Indeed, the activities of labor unions have long been exempt from both federal and state antitrust laws. Wisconsin's antitrust statute recognizes that, [t]he labor of a human being is not a commodity or article of commerce," and thus, labor unions may engage in activities to carry out the legitimate goals of their organization without running afoul of the antitrust laws. Wis. Stat. § 133.07(1). The law specifically allows "[w]orking people [to] organize themselves" to promote "the regulation of their wages and their hours and conditions of labor," *id.* § 133.08(1), and states the antitrust laws should not be construed to prohibit collective bargaining. *Id.* § 133.09. *See also* § 133.08(2).

The Plaintiffs acknowledge, as they must, that Wis. Stat. § 133.03, on which they purport to ground their antitrust claim, "was intended as a reenactment of the first two sections of the federal Sherman Act of 1890, 15 U.S.C. §§ 1 and 2 . . . and that the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act." *See Grams v. Boss,* 97 Wis. 2d 332, 346, 294 N.W.2d 473 (1980).

Thus, the language of the Sherman Act, related Acts from which Wis. Stat. Ch. 133 also derives, and cases interpreting them, are instructive here. Section 1 of the Sherman Act states, in relevant part as it did when first enacted in 1890: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 133.03 of the Wisconsin Statutes similarly provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is illegal."

The Sherman Act was supplemented by the Clayton Act of 1914, § 6 of which, 15 U.S.C. § 17, states, as it did when first enacted:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Similarly, Wis. Stat. § 133.07 provides:

> This chapter shall not prohibit the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or organizations permitted under ch. 185 or 193; shall not forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; and such organizations, or the members thereof, shall not be held or construed to be illegal combinations or conspiracies in restraint of trade, under this chapter. The labor of a human being is not a commodity or article of commerce.

The significance of the explicit command in § 6 of the Clayton Act that "The labor of a human being is not a commodity or article of commerce," was explained by the United States Supreme Court in *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940):

> A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in § 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce * * * nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust law," it would seem plain that *restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*

Apex Hosiery, at 502-03 (emphasis added, ellipsis in original).

The Court observed that the Sherman Act aimed at the protection of competition, not between employees in their dealings with their employer, but between businesses in the provision of goods and services to the public:

> [The Sherman Act] was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id., at 492-93 (1940).

Even before the interposition of the Clayton Act and the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101, *et seq.,* the Supreme Court applied the Sherman Act to labor

union activity only when a union colluded with or conscripted third parties, such as the employer's customers or its competitors, in an effort to stifle the employer's ability to compete in the market for its goods and services. One such case was the one cited by the Plaintiffs, *Loewe v. Lawlor,* 208 U.S. 274 (1907). In *Loewe,* the Supreme Court condemned, as a violation of the Sherman Act, not the employees' effort to bargain collectively with their employer, a manufacturer of hats, but the union's organization of a nationwide boycott of the employer's hats and anyone who sold them, in support of that effort. *See Loewe,* at 300-01.

Following the enactment of the Clayton and Norris-LaGuardia Acts, the legality of union activity that had previously been viewed as an unlawful restraint of trade was "to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *Hutcheson,* at 231.[4]

This did not affect the status of union activity that had never been regarded as a "restraint of trade" outlawed by the Sherman Act: employees bargaining collectively with their employer over wages, hours and terms and conditions of employment. Such activity remained excluded from Sherman Act coverage because it merely "restrain[ed] competition among [the employees] themselves in the sale of their services to the

[4]One effect of Landrum-Griffin, in direct repudiation of *Loewe,* was the removal of secondary boycotts from the ambit of unlawful restraints of trade under the Sherman Act. *See Milk Wagon Drivers v. Lake Valley Farm Products,* 311 U.S. 91, 103 (1940). Secondary boycotts were again made illegal under the Labor-Management Relations (Taft-Hartley) Act of 1947, creating § 8(b)(4) of the National Labor Relations (Wagner) Act (NLRA), 29 U.S.C. § 158(b)(4). Taft-Hartley, however, did not return secondary boycotts to the status of antitrust violations. Instead, it made them violations of the labor law, subject to injunction only at the behest of the National Labor Relations Board (NLRB). *See* 29 U.S.C. § 160(l).

employer." *Apex Hosiery,* 310 U.S. at 502. This *ab initio* exclusion from the antitrust law has come to be called the implicit "nonstatutory labor exemption," in contrast to the explicit "statutory exemptions" embodied in the Clayton and Norris-LaGuardia Acts. *See Connell Const. Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 621-22 (1975).

A union, however, treads into Sherman Act coverage when it *agrees* with a "nonlabor party," such as a competitor or customer of the employer "to restrain competition in a business market." *Id.* at 622-23. For example:

- In *Allen Bradley Co. v. Local 3, Electrical Workers,* 325 U.S. 797 (1945), Local 3 in New York City obtained agreements with local contractors to purchase electrical equipment only from local manufacturers who had closed shop agreements with Local 3 and with local manufacturers to sell only to contractors employing Local 3's members. This effectively excluded electrical equipment manufacturers in other parts of the country from the New York City market. The Court held: "When the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." *Allen-Bradley,* at 809.

- In *Mine Workers v. Pennington,* 381 U.S. 657 (1965) large coal companies negotiating with the United Mine Workers (UMW) in 1950 sought to curb overproduction by eliminating smaller companies. In exchange for UMW's support for mechanization, the companies agreed to higher wage rates than smaller companies could afford. They also obtained UMW's pledge to impose

the terms of the 1950 agreement on all other operators without regard to their ability to pay. This forced many of the smaller operators out of the business. The UMW and the large companies also agreed upon other active steps to exclude the marketing, production and sale of nonunion coal. Finding an illegal restraint of trade, the Court held:

> [A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

Pennington, at 665-66.

- In *Connell,* a New York City union's multiemployer agreement with a mechanical subcontractors association included a "most favored nation" clause, in which the union agreed that, if it granted a more favorable contract to any other employer it would extend same terms to the association's members. The union then pressured many general contractors, whose employees it did not wish to represent, to sign agreements to subcontract mechanical work only to association members. The Court held the Sherman Act applicable to the contracts with the general contractors because they had "a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." *Connell,* 421 U.S. at 635.

The Plaintiffs' citation to a number of cases involving collegiate and professional athletics adds nothing but makeweight to their argument. The most that those cases establish is that employers may violate the antitrust laws if they agree *with each other* to establish uniform terms and conditions of hiring or employment. That was the situation in *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), where the colleges and universities in Division I of the NCAA collectively agreed that none would pay an entry-level "restricted-earnings coach" a salary greater than $16,000 per year. Similarly, "no-switching" agreements, whereby employers agree not to hire each other's present or former employees, are subject to the antitrust laws:

> [A]greements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.

Nichols v. Spencer Intern. Press, Inc., 371 F.2d 332, 336 (7th Cir. 1967).

This should come as no surprise. If a labor union forfeits its exemption from the antitrust laws by joining in an agreement between such "nonlabor parties," as occurred in *Pennington* and *Connell*, the result of such collusion between "nonlabor parties" in the complete absence of a union should be obvious.

In fact, the only situation in which the antitrust laws were held not to be implicated by an agreement among employers alone to establish uniform terms and conditions of employment was that presented in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). There, after bargaining to impasse as a group with the NFL Players Association, the NFL teams collectively implemented their final offer, which included fixed salaries

of $1,000 per week for entry-level "developmental squad" players. The Supreme Court held that, because an employer's unilateral post-impasse implementation of its final offer in collective bargaining was permitted by the National Labor Relations Act, it was embraced by the implicit nonstatutory exemption to the Sherman Act:

> The labor laws give the [NLRB], not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy.

Brown, at 242.

It is against this federal backdrop that Plaintiffs' antitrust claim under Wis. Stat. § 133.03 must be examined. In the first place, it must be remembered that "the labor of a human being is not a commodity or article of commerce" under Wis. Stat. § 133.07, just as under § 6 of the Clayton Act. While Act 10 jettisoned much, it left § 133.07 untouched. Consequently, "restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce" under § 133.03 any more than they are under the Sherman Act, the Plaintiffs' strenuous assertion at page 14 of their brief to the contrary notwithstanding. *See Apex Hosiery,* 310 U.S. at 502-03.

The contracts that Plaintiffs allege as "unlawful restraints of trade" are collective bargaining agreements between an employer, the District, and the labor unions representing bargaining units of District employees, concerning those employees' wages, hours and conditions of employment. In short, the subject of these contracts is

only "the labor of human beings." Consequently, they do not involve "commodities or articles of commerce," nor do they restrain "trade or commerce" as those terms are used in Wis. Stats. Chapter 133.

Second, these contracts are not agreements with "nonlabor parties," strangers to the employer-employee relationship, to restrain competition in the marketplace of goods and services. Therefore, they remain outside the ambit of "restraints of trade" that are forbidden by § 133.03.

This is true even if the contracts are forbidden by Act 10. A contract does not become a "restraint of trade" for purposes of the antitrust laws simply because it is made unlawful by another statute. *See Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 447 (3d Cir. 1978). The Seventh Circuit has stated:

> [T]he use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs.

Parmalee Transp. Co. v. Keeshin, 292 F.2d 794, 804 (7th Cir. 1961).

The Supreme Court's decision in *Apex Hosiery* bears this out. It held the Sherman Act inapplicable to the strike there, even though it was carried out by illegal means, including the forcible takeover of the employer's plant, since the union was not acting in combination with the employer's competitors to suppress competition or fix prices. *See Apex Hosiery*, 310 U.S. at 501.

In sum, whether or not Plaintiffs have established that the subject collective bargaining agreements violate Act 10 or are void in light of Act 10, they have neither alleged nor shown a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," actionable under § 133.03. Since that is the only claim on which they could ground a demand for attorney fees, Plaintiffs' demand must fail.

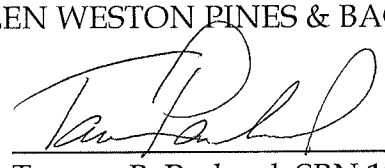
V. CONCLUSION.

For the reasons set forth in this brief, Plaintiffs' Motion for Summary Judgment must be denied, and the court should grant summary judgment in favor of KEA.

Dated this 30th day of October, 2014.

Respectfully Submitted,

CULLEN WESTON PINES & BACH LLP

By: 

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