STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

KRISTI LACROIX, et al.,

Plaintiffs,

v. Case No. 13-CV-1899

KENOSHA EDUCATION ASSOCIATION, et al.,

Defendants.

MOTION FOR LEAVE TO FILE A REPLY BRIEF

The Plaintiffs, by their undersigned counsel, hereby move for leave to file a combined reply brief to the Kenosha Education Association's Brief in Opposition to Plaintiffs' Motion for Summary Judgment and the Brief of Defendants SEIU Local 168 and AFSCME Local 2383 in Opposition to Plaintiffs' Motion for Summary Judgment. The grounds for this Motion are as follows:

1. Under the Wisconsin Statutes, a movant for summary judgment may not file a reply brief without leave from the court.
2. There is no scheduling order currently in place for this summary judgment briefing, and ordinarily a scheduling order would permit a reply brief.
3. The Defendants' two briefs raise substantial new issues that require a response, including that the Plaintiffs have not placed sufficient evidence in the record, that antitrust law is inapplicable to this case, and that Judge Colas' decision in *Madison Teachers, Inc. v. Walker*, while not precedential, nevertheless has precedential effects.

4. This Court would benefit from Plaintiffs' written responses to this argument, both by having them in clearer written form and having them in advance of the hearing scheduled for 10:00 a.m. this Friday, November 7, 2014.

Dated this 5th day of November, 2014

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PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Union Defendants do not assert that the CBAs comply with Act 10. They do not contest in any way the allegations in the complaint and the argument set forth in the Plaintiffs' opening brief that the CBAs violate Act 10 in numerous ways. Rather, the Union Defendants argue that Act 10 did not apply to them in November, 2013 based upon a circuit court decision from Dane County to which neither the Union Defendants nor the Kenosha Unified School District were parties. They argue, moreover, that this decision – now reversed – not only excuses entry into and administration of non-Act 10 compliant CBAs prior to the reversal of Judge Colas' decision, but allows them to continue to enforce such agreements after the law that they violate has been upheld.

In addition, the Union Defendants argue that the Plaintiffs' antitrust claim fails as a matter of law and that the CBAs are not properly before the Court and, thus, the Plaintiffs' motion for summary judgment should not be granted. The Court should reject each of the arguments raised by the Union Defendants.

I. THE UNION DEFENDANTS CANNOT RELY UPON THE DECISION OF JUDGE COLAS IN THE MADISON TEACHERS CASE.

It is undisputed that the decision of Judge Colas is not precedent. *See Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995) ("[A] circuit court decision is neither precedent nor authority . . . ."); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 750 N.W.2d 492 ("[A]lthough

circuit-court opinions may be persuasive because of their reasoning, they are *never* 'precedential.'"). KEA agrees. (KEA Br. at 23.)

One would think that this means that other circuit courts, presented with the same issue, would be free to reach an indepependent decision. And, indeed, that is how other circuit courts, including this one, have regarded the matter. The Defendant KEA says otherwise. It says that, until Judge Colas was reversed by the Wisconsin Supreme Court in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 851 N.W.2d 337 ("*Madison Teachers*"), Act 10 could not be enforced against anyone anywhere and was, therefore, binding on no one.

But, as pointed out in the Plaintiffs' opening brief, another Dane County Circuit Court Judge, Judge Markson, acknowledged the decision of Judge Colas but disregarded it in *Wisconsin Law Enforcement Ass'n v. Walker*, Dane County Case No. 12-CV-4474. If KEA's argument[1] were correct, Judge Markson would not have been free to declare Act 10 constitutional, and this Court would have had to rule in KEA's favor at every point in this case up and until Judge Colas was reversed. It would have been unable to say, as it did, that Plaintiffs had a reasonable probability of success on the interests.

That this Court and Judge Markson got it right has been confirmed by the Wisconsin Supreme Court. The Supreme Court has already ruled that Judge Colas' decision did not apply to non-parties, concluding that WERC was permitted to apply Act 10 to non-parties like KEA (*Madison Teachers, Inc. v. Walker*, 2012AP2067, Nov. 21, 2013 Order, ¶20). If KEA was right – if a single declaratory judgment by a single court was the equivalent of a statewide injunction such that Act 10 could not be enforced against anyone anywhere – then that court would have affirmed, not vacated, Judge Colas October 25 contempt order. KEA ignores this ruling, arguing that it was entitled to rely upon the decision of Judge Colas and ignore the requirements of Act 10. KEA tries to give Judge Colas' decision precedential effect while calling it something different.

First, KEA cites to a group of "intervention" cases at pages 20-22 of its brief. KEA primarily relies upon the Court of Appeals and Wisconsin Supreme Court decisions in *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W.2d 208, and 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, along with *White House Milk Co. v. Thomson*, 275 Wis. 243, 81

[1] The brief submitted by AFSCME and SEIU does not make any argument that they were entitled to rely upon the decision by Judge Colas.

N.W. 2d 725 (1957). This is the same argument that it made – and that this court rejected – last December. (Defendant Kenosha Education Associations Brief in Opposition to Plaintiffs' Motion for Temporary Injunction, pp. 6-8). These cases merely say that if the Attorney General of Wisconsin is defending the constitutionality of a statute, then other parties normally do not have the ability to intervene as a matter of right simply because they also have an interesest in having the statute upheld. They say absolutely nothing about the validity of a circuit court's declaratory judgment ruling after it has been overturned on appeal. They say nothing about the effect that a declaratory judgment on appeal would have on other parties in other cases.

The second set of cases relied upon by KEA are closer, but still inapposite. They deal with the extent to which a party to a subsequently reversed judgement can rely on it to excuse actions undertaken in reliance upon it. *Slabosheske v. Chikowske*, 273 Wis. 144, 77 N.W. 2d (1956), *Slabosheske* is an isolated decision, although it has been cited in two other cases, *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), and *In re Marriage of Harris*, 141 Wis. 2d 569, 415 N.W. 2d 586 (Ct. App 1987). (KEA Br. 24-25.) KEA, however, misunderstands or misapplies this legal principle in three different ways. First, each of those cases dealt with the effect of a judgment (later reversed) in a subsequent case involving one of the parties to the judgment. Second, KEA seeks to bootstrap *Slabosheske*'s limited effect – the excusing of acts undertaken by the parties to a judgment in reliance on its validity – into a justification for extended disregard of the law. Finally, KEA's reliance on Judge Colas' decision was not in good faith.

A. *Slabosheske* and its Progeny Permit Reliance Only on the Effect a Circuit Court Decision Has on a Party to that Circuit Court Case

In *Slabosheske*, the issue was the effect of a circuit court judgment as to whether a school district operated by the school committees of Marquette and Green County and known as District No. 7, had been properly dissolved and consolidated with the Princeton school district as Joint District No. 2. The circuit court found that District No. 7 had not been properly dissolved.and still existed. This decision was later reversed. In the interim, District No. 7 borrowed money and issued a promissory note. The note went unpaid and the holders sued District No. 2, the successor district, on the note. A defense was raised that District No. 7 did not lawfully exist at the time the note was given and its actions were null and void. In other words, the successor district tried to avoid paying a lender who had relied on the judgment declaring that the previous

district still existed. The Wisconsin Supreme Court concluded that there was "a measure of logic and of truth in the proposition" but that the plaintiffs who receivied the promissory note should have been able to rely on the circuit court's judgment that the school district still existed (even though that judgment was later reversed). *Slabosheske*, 273 Wis. at 150.

Slabosheske is easily distinguished. The parties said to be bound to the judgment that was ultimately reversed – District No. 7 and its successor, District No. 2 – were parties to that judgment. KEA and the Kenosha Unified School District were **not** parties to the *Madison Teachers* case. As this Court has held, the Kenosha district was not bound by the *Madison Teachers* case, so KEA could not rely on that case's (non-existent) effect on the Kenosha district like the *Slabosheske* note holders could rely on the circuit court decision's effect on District Nos. 7 and 2. In addition, protecting the reliance interest of the lender in *Slabosheske* did not prejudice the rights of any third parties. Plaintiffs here were not parties to *Madison Teachers*; upholding the CBAs would substantially prejudice their rights in a way not permitted in *Slabosheske*.

This limitation on the scope of the reliance rule set forth in *Slabosheske* is embedded in its rationale. As the Suupreme Court noted ""[u]ntil set aside in a proper proceeding for that purpose, a voidable judgment has the same force and effect as though no error had been committed; it will support proceedings taken under it, and, as discussed supra §§ 428–433, it is not subject to collateral attack." *Slabosheske*, 273 Wis (quoting 49 C.J.S., Judgments, § 449, pp. 880-81). A judgment which has been reversed will still support proceedings taken under it *prior to the reversal* and is not subject to collateral attack, but such proceedings all deal with the parties to the case. They have nothing to do with non-parties trying to rely upon that judgment in a second, completely unrelated, case. That type of reliance (by parties in an unrelated case) is called "precedent," and everyone agrees that Judge Colas' decision was not precedent.

What KEA seems to be saying is that, because this was a declaratory judgment action brought against an agency of the state, *everyone else in the state was somehow bound by it until* it was *reversed.* It cites absolutely no precedent for this startling proposition – one that apparently eluded this Court, Judge Markson and even the Supreme Court of this state. It refers only to the requirement that one who seeks a declaration that a statute is unconstitutional must notify the Attorney General and the common place notion that the Attorney General is charged to defend the state's laws.

At the risk of understatement, this is pretty thin support for such an extraordinary proposition. It would mean that anytime "anyone anywhere" got a circuit court to declare a statute unconstitutional, " no one nowhere" would be bound by the law. If, for example, a criminal defendant gets a circuit court to declare a portion of the criminal statutes unconstitutional, no other defendant can be prosecuted under the law until it is reversed. If a single circuit court says that a provision in Wisconsin's campaign finance law – say the limit on contributions to an individual candidate – are unconstitutional, everyone in the state is free to violate it even though no injunction has been issued. We are all familiar with situations in which the lower courts disagree on the constitutionality of a law. If KEA were correct, this would rarely happen. As soon as a lower court declared something unconstitutional (at least in a case against the government or one in which the Attorney General has notice – which, in Wisconsin, is every case), no other lower court would be free to disagree. The state would be bound by the single adverse decision and could not defend itself. It would import appellate level binding precedent to the rulings of the circuit courts, an effect everyone agrees is not the law.

Althought KEA does not say so, this amounts to an assertion that everyone else in the state is in privity with a state defendant, and every other potential plaintiff in the state is free to somehow assert offensive collateral estoppel (or issue preclusion) as soon as the state loses a constitutional claim to "any one anywhere." If this were the law of the state, there would be some support for it somewhere. There is not.

To conclude that it is not the law of this state requires looking no further than the supreme court's Novemer 21, 2013 order in *Madison Teachers* vacating Judge Colas' contempt order. At the heart of KEA's argument is the same argument KEA made to Judge Colas – that because a declaration of unconstitutionality binds the state in its dealing with everyone else, no injunction was necessary. (KEA Br., 18-23.) However, the Supreme Court rejected that argument, vacating the contempt order.

B. Judge Colas' Decision Cannot Excuse a Continuing Violation of Act 10.

Even were this not so, Judge Colas' decision, at most, excuses actions taken prior to the Supreme Court's decision in *Madison Teachers*. It might prevent recovery of monies unlawfully paid pursuant to a CBA or an effort to collect damages or "undo" some action taken in reliance on the contracts prior to reversal of the decision. But it cannot possibly justify continued enforcement of agreeements that violate what has been determined by the Wisconsin Supreme

Court to be a constitutional and binding law. Just as Mr. Slabosheske could not have continued to lend money to District No. 7, KEA cannot continue to enjoy the fruits of an unlawful contract.

Recognizing that, KEA shifts its argument, saying that applying Act 10 – a law that was passed prior to entry into the CBAs – to the CBAs prospectively would be an unconstitutional impairment of a contractual right, citing the United States Supreme Court's decision *in Energy Reserves Group, Inc. v. Kansas Power & Light Company*, 459 U.S. 400 (1983) (KEA Br. 27.) Its argument spans little more than half of a page and is underdeveloped. But it is, nevertheless, clearly wrong.

Energy Reserves, which rejected the impairment claim before it, is limited to a *subsequent* legislative enactment. KEA seems to think that a reversed judgement makes a prospective law subsequent, but it cites no authority for that proposition. If it were true, anytime a party got relief in a lower court, it could enter into an extension of a contract without fear that it might ultimately be reversed. But one cannot have a settled contractual expectation in an agreement that one knows violates a statute which, as Judge Colas and this court recognized, is presumed to be constitutional and which is to be reviewed *de novo* by the appellate courts.

Even were this not so, there is no rule against legislative impairment of contracts. Every contract – even collective bargaining agreements – are subject to the state's police power to protect its citizens' health, safety and welfare. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶312, 295 Wis. 2d 1, 172-73, 719 N.W.2d 408, 493-94 (opinion of Justice Roggensack concurring in part and dissenting in part) (quoting *Atlantic Coast Line Railroad Co. v. City of Goldsboro,* 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914) ("[I]t is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and *is inalienable even by express grant;* and that all contract and property rights are held subject to its fair exercise.")

Although KEA does not say why not, it seems clear that Act 10, which was enacted to adjust the balance of power between taxpayers and unions and help local governments cope with reductions in state aid brought about by a budgetary shortfall is an exercise of that police power.

C. KEA Did Not Rely on Judge Colas' Decision in Good Faith

In *Slabosheske*, the plaintiffs relied upon the circuit court's judgment in good faith, to their detriment. They loaned money to the school district that was the subject matter of the circuit court's judgment in good faith reliance on the circuit court's decision that the district had not been dissolved. There is no such good faith reliance here. KEA and KUSD were not innocently relying upon the decision of Judge Colas and entering into a business transaction based upon that innocent reliance.

Prior to entering into collective bargaining, the School District Superintendent Michele Hancock and then Board President Mary Snyder sent a letter to employees explaining that it would be illegal for the district to collectively bargain a new agreement with employees. A true and correct copy of that letter is attached to the Complaint as *Exhibit B*. The letter is entitled "There is NO Legal Window" and states that the School District's attorney advised that, "there is no legal authority for claiming that Judge Colás' decision applies to the School District or any of its bargaining units." The letter indicates that the School District's attorney also stated that, "Should the [School District] engage in bargaining outside the scope of Act 10, both the district and individual board members face the potential of having penalties assessed against them for knowingly violating Act 10."

On November 12, 2013, three days prior to approval of the CBAs, counsel for the Plaintiffs wrote to the Board and School District, putting them on notice that persons in the position of the Plaintiffs absolutely did object to the proposed course of action and that, if the District and School Board went ahead, they would be courting litigation. A copy of that letter was filed with the Court on December 9, 2013 as an attachment to Plaintiffs' Brief in Opposition to the Motion to Dismiss.

KEA and the Kenosha Unified School District knew full well that what they were doing was in violation of Act 10 and would be challenged. They knew that Judge Colas' decision was being appealed and did not apply to them. KEA took the chance that Judge Colas' decision would be overturned. They were wrong. Their gamble cannot be used to prejudice other parties.

Finally, KEA may also argue that it was not relying upon Judge Colas' declaratory judgment decision so much as it was relying on Judge Colas' ruling on the motion for contempt (and WERC's follow-up conduct in compliance with Judge Colas' contempt decision). But

Judge Colas' decision on contempt was vacated by the Wisconsin Supreme Court and does not change the legal fact that KEA was decertified as a matter of law based upon the mandatory language of §111.70(4)(d)3.b. KEA was not the legal bargaining agent for anyone in November, 2013 when it collectively bargained with the Kenosha School District. But even if it was, even if Judge Colas' contempt order had not been vacated, then all that would mean is that KEA could bargain with the school district over base wages. Even if KEA was the certified bargaining agent despite the fact that it was not recertified as required by Act 10, it could not collectively bargain on the topics contained in the CBAs.

II. THE DEFENDANTS VIOLATED CHAPTER 133.

The Defendants claim that plaintiffs are asking this court to do what "no court" has ever done – rule that "unions and employers violate the antitrust laws simply by entering into collective bargaining agreements." (KEA Br. 28.[2]) Plaintiffs ask no such thing. There is no question that legally authorized collective bargaining does not violate Wisconsin antitrust law. Authorized collective bargaining, as Paintiffs pointed out in their opening brief, is entitled to a statutory exemption. The Legislature has specifically provided that Chapter 133 is to be "so construed as to permit collective bargaining associations of employees." Federal antitrust law also contains an exemption for authorized collective bargaining. (*See* Pl. Br. 13-14.)

Straw men notwithstanding, the question before this Court is whether and how the antitrust laws are to be applied to collective action by employees who are *not* represented by an authorized labor union and who are *not* engaged in authorized collective bargaining. Suppose there were no KEA. Suppose the vast majority of the licensed teachers in Kenosha had a meeting. Suppose they agreed that they would refuse to work for the District unless the District agreed to meet their terms for pay and benefits. Would that conduct violate the antitrust laws?

The United States Supreme Court's 1990 decision in *F.T.C. v Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990), provides the answer, and the answer is yes. That case involved a group of roughly 100 independent lawyers who entered into arrangements with the government of the District of Columbia to provide legal services to indigent defendants in the D.C. criminal courts. They wanted a raise in their hourly rate, and they could not get one from

[2] The brief submitted by AFSCME and SEIU is identical to the brief submitted by KEA on this issue.

the government. So they had a meeting, and agreed that they would all agree to refuse to accept new cases until the government gave them the raise that they wanted. The F.T.C. sued them, claiming that their conduct represented a concerted refusal to deal in violation of the antitrust laws. No exemption was available because the Superior Court Trial Lawyers Association was not an authorized labor organization and, in any event, was not authorized by law to collectively bargain hourly rates for its members.

The Supreme Court agreed with the F.T.C.'s analysis. It held that collective action by the otherwise independent trial lawyers constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act. Their conduct was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer with their services. And such a horizontal agreement among competitors was unquestionably a naked restraint on price and output and thus a violation of the antitrust laws. *Id.* at 422-423.

The same would obviously be true for an agreement between licensed teachers in Kenosha to refuse their services to the school district except on terms and conditions that they collectively approved. Just as was the case with independent trial lawyers, collective action by teachers to determine the terms and conditions of their employment would violate the antitrust laws. It is precisely *because* collective action by teachers and other employees would violate the antitrust laws that a specific *exemption* for authorized collective bargaining is required. But if collective bargaining is not authorized, the exemption from the antitrust laws does not apply. That is what happened here.

The Union Defendants rely on the United States Supreme Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), a case that they say stands for the proposition that under the Clayton Act "the labor of a human being is not a commodity or article of commerce." (KEA Br. 31.) But *Apex Hosiery* dealt with the antitrust implications of an allegedly unlawful strike by a recognized and dulty constituted labor union. The language quoted by the Defendants was neither essential to the decision nor important to the Court's reasoning.

More to the point, however, is that at least for the proposition asserted by the defendants, *Apex Hosiery* is no longer good law. As commentators have pointed out, the argument that antitrust laws do not apply to labor market restrictions is derived *solely* from the dicta in that decision, and is disproven by later Supreme Court decisions applying antitrust laws to labor

market restrictions. Antitrust Law Developments (Sixth), American Bar Association Section of Antitrust Law (2007) at 1446, n. 1103.

As the Plaintiffs have already pointed out, there have been numerous cases since *Apex Hosiery* in which the courts have held that markets involving the "labor of human beings" are markets for antitrust purposes and markets in which, absent specific labor exemptions, the antitrust laws are to be fully applied. *See Brown v. Pro Football*, 318 U.S. 231 (1996); *U.S. v. Hutcheson*, 312 U.S. 219 (1941). Many, but by no means all, of these cases have involved the markets in which professional athletes offer their services to employers. (*See* Pl. Br. 14.) The *Superior Court Trial Lawyers* case involved the labor of lawyers who actually are – popular opinion to the contrary – human beings.

The remaining cases case cited and discussed at some length in the Union Defendants' briefs are interesting, but beside the point. They have to do with the proper boundaries of the labor exemption under federal antitrust law and underscore the general rule that the antitrust laws *do* apply to labor markets unless the statutory exemption is available. This is not a case about some form of a secondary boycott, like *Allen Bradley Co. v. Local 3, Electrical Workers*, 325 U.S. 797 (1945), or some form of otherwise valid collective bargaining agreement that targeted small competitors, like *United Mine Workers v Pennington*, 381 U.S. 657 (1965). Whether and to what extent an authorized union engaged in authorized collective bargaining could nevertheless violate the antitrust laws is really beside the point. Here there was no authorized union and no authority at all for the bargaining at issue. Independent employees are simply not entitled to band together to negotiate with their employer unless they are authorized to do so by way of lawful collective bargaining. If they do it anyway, as they did here, they have violated Chapter 133.

III. THE RELEVANT CONTRACTS ARE ALL BEFORE THE COURT.

The Union Defendants strangely contend that the Court should deny the Plaintiffs' motion for summary judgment because they allege that the relevant contracts are not before the Court. The Plaintiffs characterize this argument as "strange" because the CBAs were produced by the Union Defendants in discovery and are in the summary judgment record before the Court.

Starting with the SEIU and AFSCME, the contracts are attached to the McGrath Affidavit filed with the Court on September 23, 2014 as Exhibits H and I. As reflected in the McGrath

Affidavit these are the contracts produced by the SEIU and AFSCME in discovery. (McGrath Aff. §§ 9 and 10.) The actual discovery responses from KEA, SEIU and AFSCME are all attached to the McGrath Affidavit as Exhibit F.

The Plaintiffs sent only one document request to each Defendant. For example, the document request and the response from AFSCME is as follows;

> Document Request No. 1. Produce a copy of all documents that contain the terms of the current collective bargaining agreement between the Kenosha Unified School District and American Federation of State, County and Municipal Employees, Local 2383.
>
> Response: Please see the enclosed documents.

Attorney McGrath then attached the enclosed document to his affidavit. Attorney McGrath may not have personal knowledge of the contracts but he has personal knowledge that the Plaintiffs asked Defendants to produce the CBAs and that the documents attached to his affidavit are the documents that the AFSCME and SEIU attached to their responses. Moreover, counsel for AFSCME admits that the documents attached to the McGrath Affidavit were the ones produced by him in discovery ("While it is true that these documents were produced by Defendants in discovery . . . " – AFSCME/SEIU Br. 7.)

Further, AFSCME admitted in its Answer to the Second Amended Complaint that AFSCME and the School District signed the Tentative Agreement on November 11, 2013 and that a true and correct copy of that agreement was attached to the Complaint as Exhibit E (AFSCME Answer ¶51), that the School Board ratified the collective bargaining agreement at that meeting on November 15, 2013 (AFSCME Answer ¶56), and that the Tentative Agreement incorporated all of the terms of the expired agreements between the district and the Unions and amended those terms as set forth in the Tentative Agreement (AFSCME Answer ¶57.) These admissions are sufficient, in and of themselves, to present the legal issue to the Court. The Tentative Agreement contains terms that violate Act 10. AFSCME admits that the terms in the Tentative Agreement became part of the contract. That undisputed fact, standing alone, is sufficient for the Court to rule that the CBAs are unlawful because it is undisputed that they contain terms that violate Act 10.

The situation for SEIU is the same as for AFSCME. SEIU produced its contract in discovery and answered the Second Amended Complaint in the same way as AFSCME. The Plaintiffs do not know what game AFSCME and SEIU are playing but they cannot hide from the

documents they produced in discovery in response to a request to produce the current CBAs and their admissions in their Answer. The Kenosha Unified School District has already agreed that the CBAs are void as a matter of law. The only legal question remaining is whether the Union Defendants can persuade the Court that the CBAs are not void. AFSCME and SEIU are apparently not even going to try do so. Their current position appears to be – Contract? What contract are you talking about? The Plaintiffs' response is simple – we are talking about the contract that they collectively bargained in November, 2013, that is contained in the Tentative Ageement that they admitted to in Paragraphs 54 and 57 of their Answer and that they produced in discovery.

The issue with KEA is only slightly more complicated. The Plaintiffs sent the same discovery requests to KEA that they did to AFSCME and SEIU and again only included one document request. KEA also responded by producing the CBAs. However, KEA's responses indicated that there were separate CBAs for each of its five bargaining units (teachers, education support personnel, substitute teachers, educational interpreters, and carpenters and painters). The Plaintiffs included in the summary judgment record only the CBA documents for the teachers. They were attached to the McGrath Affidavit as Exhibits E and G. Exhibit E is the 2011-2013 CBA for teachers. Exhibit G is the Tentative Agreement that was signed in November 2013 that made changes to the previous agreement. The Court needs both because KEA's position as set forth in its brief is as follows:

> [T]he 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.

(KEA Br. 17.)

Plaintiffs' apparent mistake with respect to KEA was to attach these documents only for teachers and not for the other four bargaining units. The contracts all appeared to be nearly identical and the Plaintiffs believed and continue to believe that if the Court rules on the CBA for the teachers, that will resolve the dispute. But if the Plaintiffs belief is wrong there are two solutions. The first is to grant summary judgment with respect to the CBA for the teachers and hold the dispute for the other bargaining units for trial. The second is to to supplement the

record with the remaining documents. This seems particularly unnecessary, however, for two additional reasons.

First, Exhibit G (the Tentative Agreement) applies to all of the bargaining units. It contains terms that violate Act 10. That undisputed fact, standing alone, is sufficient for the Court to rule that all of the CBAs are unlawful because all of them contain these illegal terms. It simply does not matter what terms the prior contracts contained that were incorporated into the new contracts, because the new terms from the Tentative Agreements violate Act 10. Thus, the undisputed facts are sufficient to justify summary judgment declaring that the CBAs for all bargaining units entered into after the effective date of Act 10 are unlawful except for any provisions as to base wages.

CONCLUSION

The collective bargaining between the Union Defendants and the School District was illegal under state law. Further, the substance of the CBAs violate Act 10 and Wisconsin's antitrust law. The School District has now acknowledged that the CBAs are void. However, the Union Defendants continue to seek enforcement of the CBAs (although based upon their brief it is an interesting question as to whether AFSCME and SEIU are still seeking enforcement). The Plaintiffs therefore request summary judgment declaring that the CBAs are void and also request that the Court hold a hearing to determine the attorney fees awardable to the plaintiffs under Wis. Stat. § 133.18.

Dated this 5th day of November, 2014.

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