STATE OF WISCONSIN | CIRCUIT COURT BRANCH 42 | MILWAUKEE COUNTY

VICTORIA MARONE

Plaintiff,

v.

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT

Defendant,

v.

AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO

Intervenor-Defendant.

Case No. 13-CV-004154

Hon. David A. Hansher

**JOINT MEMORANDUM IN SUPPORT OF DEFENDANT'S AND INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT ON GROUNDS OF MOOTNESS**

Victoria Marone ("Marone") brought this declaratory judgment action to have conditional successor collective bargaining agreements ("Conditional Successor Agreements," "Agreements," or "CSAs"), negotiated by defendant Milwaukee Area Technical College District ("MATC") and intervenor-defendant American Federation of Teachers, Local 212, WFT, AFL-CIO ("Local 212") (collectively, the "Defendants"), declared unlawful, invalid, and void. (Compl. ¶¶ 1-2).

MATC and Local 212 agreed that certain conditions would have to be satisfied before the Agreements would become binding contracts, however, and further agreed that those conditions were not met. Consequently, the Defendants deny that the Agreements ever became binding,

enforceable contracts. Marone is therefore now in the unorthodox position of first asking the court to declare that the Conditional Successor Agreement for the part-time faculty[1] bargaining unit is a binding and valid contract - over the contrary stipulation of the parties to that very Agreement - and, if she is successful, then asking the court to turn about and declare that same Agreement invalid and unenforceable.[2]

Marone's complaint should be dismissed as moot for three distinct reasons. First, by its own terms, the document that Marone seeks to have the court declare invalid expired on February 15, 2015. As a result, Marone's Complaint does not seek any relief after the alleged contract has expired that would be anything but academic, because either a void agreement or an expired agreement would have the same import to her today: neither has any effect.

Second, MATC and Local 212, the only parties to the Conditional Successor Agreement, agree that certain conditions had to be met before a contract could be consummated and – because those conditions were never met – they also agree that they never entered into a binding and enforceable contract. This conclusion is confirmed by their actions during the one year period supposedly covered by the Agreement. In the absence of an actual contract that was really in effect, Marone's quest to invalidate it is moot.

Finally, the undisputed evidence demonstrates that a binding contract was not created because a final agreement was never assembled or signed by MATC and Local 212.[3] There is

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[1] The court previously found that Marone does not have standing to bring an action relating to the full-time faculty or paraprofessional conditional successor agreements. (10/7/14 Decision & Order, p. 11).

[2] Marone does not seek monetary damages. Marone's complaint did include a demand that MATC pay her fees and costs of bringing an action under Wis. Stat. §133.03. The court dismissed this claim. (10/7/14 Decision & Order, p. 13). Marone has not alleged that she is entitled to fees and costs from Local 212.

[3] While the court previously found that the part-time faculty Conditional Successor Agreements were signed, such a determination was made in the context of a joint motion to dismiss and for judgment on the pleadings where the Defendants were not afforded a reply brief to respond to Marone's assertion that the agreements were signed, the court was limited to the pleadings, facts pleaded and reasonable inferences drawn from those facts were accepted as true, and the Defendants were unable to submit evidence to establish that the Conditional Successor Agreements never became binding and enforceable contracts.

no point in pursuing a declaratory ruling to declare a contract invalid and void, when it never existed in the first place, the parties never actually implemented it, and in any event, it would now be expired.

## STATEMENT OF UNDISPUTED FACTS

### 1. The Impact Of 2011 WI Act 10 And Subsequent Litigation.

In 2011, the Wisconsin Legislature enacted 2011 WI Act 10, eff. June 29, 2011 ("Act 10") and 2011 Act 32, eff. July 1, 2011 ("Act 32"), which amended and modified parts of Act 10. (Compl. ¶ 7.) Act 10 prohibited collective bargaining over anything other than total base wages for many public employers and their employees, modifying numerous statutes under MERA[4] including Wis. Stat. §§ 66.0506 and 111.70(4)(mb).

Litigation challenging the constitutionality of Act 10 followed almost immediately. On March 30, 2012, the U.S. District Court for the Western District of Wisconsin struck down Act 10's provisions that eliminated fair share and prohibited union dues deductions as unconstitutional. On September 14, 2012, Dane County Circuit Court Judge Juan Colas issued an order granting the plaintiffs' motion for summary judgment and declared certain statutory provisions that were part of Act 10 to be unconstitutional. *Madison Teachers, Inc. v. Walker*, Case No. 2012AP2067, 2013 WL 1760805, *1, 3 (Ct. App. Apr. 25, 2013).

The Court of Appeals, on March 12, 2013, denied a subsequent motion to stay pending appeal. *Madison Teachers*, 2013 WL 1760805, *3. In doing so, the court identified the dilemma that Act 10 and the *Madison Teachers* case created for Wisconsin public employers, noting that:

> It may be that some employers will choose to play it "safe" and engage in bargaining to protect themselves if the legislation at issue here is ultimately declared unconstitutional. And, if employers choose this route, as the appellants acknowledge in supplemental briefing, *there would be no legal impediment to negotiating conditional contracts* or retroactive wages that take into account the

[4] Municipal Employment Relations Act ("MERA"), Wis. Stat. §§ 111.70–111.77.

> uncertain legal status of the challenged statutory provisions, or to attempting to recoup any overpayments if Act 10 is ultimately upheld. Such action would reduce the risk of irreparable harm.
>
> If, on the other hand, this confusion leads municipal employers to decline to bargain, such an effect is not harm, in the appellants' view, but rather the proper course. But this action also carries with it some risks. If these employers wrongly predict the outcome of the appellate proceedings regarding the merits, they may incur litigation costs and, ultimately, be required to compensate union members for losses owing to the employers' compliance with changes in MERA that are later deemed unconstitutional.

March 12, 2013 Clerk of Wisconsin Court of Appeals Order, *Madison Teachers Inc. vs. Scott Walker et al*, Dane County No. 2011CV003774, Dkt. 97 at pp. 14-15 (*emphasis added*).

It should be noted that Attorney General Van Hollen – while defending the constitutionality of Act 10 – specifically endorsed the court of appeals' statement that conditional negotiations were an appropriate means for a municipal employer to satisfy its legal obligations while litigation over the constitutionality of Act 10 progressed. *Id.*

On January 18, 2013, the 7th Circuit reversed Judge Conley's decision, finding Act to be constitutional in its entirety. *Wisconsin Educ. Ass'n Council* v. Walker, 705 F.3d 640 (7th Cir. 2013).

On July 31, 2014, the Wisconsin Supreme Court, overturned Judge Colas' decision, holding that Act 10 was constitutional. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 851 N.W.2d 337

**2. Negotiating The Conditional Successor Agreements.**

In the midst of the litigation over the constitutionality of Act 10 and whether the Circuit Court's decision in *Madison Teachers* would be stayed, the MATC District Board found itself confronting the very dilemma identified by the Court of Appeals. First, the collective bargaining agreement that had been signed by the parties and that was in effect prior to the effective date of

Act 10 was due to expire on February 15, 2014. Second, MATC had been presented with a demand to bargain by Local 212. Third, MATC was in the state of "limbo" that the Wisconsin Court of Appeals had identified regarding what would be lawful and what would be prohibited collective bargaining under Wisconsin law. (Affidavit of Daniel McColgan ¶5).

On November 12, 2012, the MATC District Board chose the route the Court of Appeals described as "play[ing] it 'safe'" and voted to enter into negotiations with Local 212 concerning a successor agreement. (Compl., ¶17, Ex. A). Discussions with Local 212's bargaining unit that represents Marone, began in December of 2012. (Aff. of McColgan, ¶4); (Affidavit of Frank Shansky, ¶ 10). At that time, the decisions of both the federal and state trial courts were the latest judicial decisions regarding Act 10.

MATC specifically stated in negotiations that any tentative agreements were to be expressly contingent on the outcome of the pending Act 10 litigation. (Aff. of McColgan, ¶¶4-7, Exs. A-C); (Aff. of Shansky, ¶ 13). This was reflected in the ground rules and conditions for bargaining that were presented by MATC's representatives. (Aff. of McColgan, ¶4, Ex. A). MATC repeatedly conditioned its willingness to participate in the negotiations process on pending Act 10 litigation, such that any agreements reached would conform to the courts' decision as a condition of the agreements themselves. (Aff. of McColgan, ¶¶4-7, Exs. A-C). MATC's goal was to comply with the law, whatever the final decision of the appellate courts. (Aff. of McColgan, ¶6).

Initially, Local 212 took the position that negotiations could proceed lawfully for the same reasons that the Dane County Circuit Court had expressed in its decision: provisions of Act 10 that were important to the operations of the union were unconstitutional, as two trial courts had declared. Moreover, Local 212 initially took the position that, even if the Wisconsin

Supreme Court were to reverse the Dane County trial court, it would still be unclear whether contracts negotiated during the interim period between the two decisions would be viewed as lawfully negotiated and/or effective. (Aff. of Shansky, ¶ 8).

Over the course of months of negotiations, tentative agreements regarding various terms and conditions of employment that were to make up the proposed Conditional Successor Agreements were negotiated and agreed to by MATC's and Local 212 bargaining units. (Aff. of McColgan, ¶8); (Aff. of Shansky, ¶ 14). As the tentative agreements were reviewed, MATC's and Local 212's bargaining representatives recorded the date, the party's initial, and a notation "TA," confirming that both parties understood that the terms constituted only a tentative agreement. (Aff. of McColgan, ¶¶8-9, Ex. D); (Aff. of Shansky, ¶ 15). MATC and Local 212 reached tentative agreements on all of the terms and conditions of the proposed Conditional Successor Agreement between February 19, 2013 and February 26, 2013. (Aff. of McColgan, ¶9, Ex. D); (Aff. of Shansky, ¶ 16).

The MATC District Board voted, on February 26, 2013, to ratify a "Summary of Proposed Labor Agreement" (*See* Compl. Ex. D). This document summarized the tentative agreements that would form the basis for collective bargaining agreements with the Full-time Faculty/Professionals, Paraprofessionals, and Part-time Faculty bargaining units represented by Local 212. (Aff. of McColgan, ¶10). The terms of the agreements would commence on February 16, 2014 and end on February 15, 2015. (*See* Compl. ¶¶ 20, 22, 23, Ex. D.)

MATC continued to reserve the right to refrain from entering into binding collective bargaining agreements unless and until a final appellate court decision found Act 10 to be unconstitutional as part of approving the Conditional Agreements. (Aff. of McColgan, ¶¶10-11); (Aff. of Shansky, ¶ 13). MATC further noted that the TAs were not themselves final collective

bargaining agreements; rather, final drafts of the collective bargaining agreements, containing the terms of the tentative agreements, would have to be prepared and executed by MATC and Local 212. (Aff. of McColgan, ¶11); (Aff. of Shanksy, ¶¶ 17, 18).

A key component of the proposed Conditional Successor Agreement, as described at the top of the "Summary of Proposed Labor Agreement," in bold print, was that the agreements were subject to all applicable laws and regulations and conditioned on Judge Colas' decision in *Madison Teachers* being upheld by Wisconsin's appellate courts. (Compl. Ex. D.) The summary that was approved by the MATC District Board stated:

> Note: the parties' negotiations were entered into and their tentative agreements have been made subject to all applicable laws and regulations. The parties' negotiations and agreement are and have been conditioned on Judge Colas' decision being upheld by Wisconsin's appellate courts. If Judge Colas' decisions were to be overturned or invalidated, fully or in part, all obligations to bargain or resulting agreements are to be contingent on relevant Wisconsin appellate courts' rulings and applicable laws.

(Compl. Ex. D). Thus, the proposed Conditional Successor Agreement was expressly made dependent on Judge Colas' determination that Act 10 was unconstitutional being upheld by appellate courts. (Aff. of McColgan, ¶¶7, 10, 11); (Aff. of Frank Shansky, ¶¶ 6, 13, 20).

Two months later, the Wisconsin Court of Appeals certified the *Madison Teachers* appeal to the Wisconsin Supreme Court, asking the Supreme Court to address the issue of whether Act 10 was constitutional and explicitly acknowledging the type of uncertainty that MATC and Local 212 faced in negotiating the Conditional Successor Agreement. *See Madison Teachers*, 2013 WL 1760805, *12.

The Board resolutions approving the tentative agreements were also dependent upon a final, approved agreement being signed by the MATC District Board and the Administration.

> BE IT RESOLVED, that the Milwaukee Area Technical College District Board hereby accepts and approves the agreement reached by MATC and

> Local 212 [Respectively, Full-time Faculty, Part-time Faculty and Paraprofessionals] bargaining unit, and authorizes signatures representing the MATC District Board and the Administration on the approved agreement, at which time said agreement shall be incorporated by reference to this resolution.

(Compl. Ex. C).

However, final collective bargaining agreements incorporating the terms of the tentative agreements were not agreed upon and were not executed by MATC or Local 212. (Aff. of McColgan, ¶12); (Aff. of Shansky, ¶ 19).[5]

**3. Terms And Conditions Of Employment Implemented.**

On February 15, 2014, the previous part-time faculty collective bargaining agreement between MATC and Local 212 expired. However, the Wisconsin Supreme Court had not yet issued its ruling regarding the constitutionality (or unconstitutionality) of Act 10 in the *Madison Teachers* case, so no further guidance was available from the courts. At that point, MATC and Local 212 continued to wait for the Wisconsin Supreme Court to rule and did not implement the Conditional Successor Agreements as though they represented a final contract; instead, any number of those provisions reflected prevailing practices that were continued, certain provisions reflected in the Agreements were immediately terminated or changed, while others were re-evaluated as part of developing an employee handbook. (Aff. of McColgan, ¶¶13-16); (Aff. of Shansky, ¶ 21).

The terms and conditions of employment that were implemented differed in many respects from and, indeed, were at times contrary to the terms and conditions in the previous

[5] The court, restricted by the confines of the pleadings on the Defendants' prior motion for judgment on the pleadings and motion to dismiss based on mootness and without the benefit of the Defendants' evidence or explanation that the tentative agreements marked as "TA" and only signed by a representative of MATC's and Local 212's bargaining did not constitute final, binding agreements, determined that a Conditional Successor Agreement was signed by both Defendants on February 26, 2013. (11/17/14 Decision & Order, pp. 3-4). As set forth herein and demonstrated by the undisputed evidence submitted on summary judgment, those signed tentative agreements were not intended or considered to be the final and binding Conditional Successor Agreement.

collective bargaining agreement and the terms and conditions of the proposed Conditional Successor Agreement. (Aff. of McColgan, ¶¶13-16). Among other things, and of great weight to Local 212, MATC informed Local 212 that it would not continue fair share or dues deductions from employee payroll. MATC also declined to continue grievance arbitration during the 2014-2015 year. All of these provisions were contained in the TA's. (Aff. of McColgan, ¶¶13-14); (Aff. of Shansky, ¶ 21).

Once the Wisconsin Supreme Court reached its decision in *Madison Teachers* on July 31, 2014, MATC and Local 212 - the only parties to the proposed Conditional Successor Agreement - agreed that the Conditional Successor Agreement did not come into existence and were not, and could not be, binding contracts. (Aff. of McColgan, ¶12); (Aff. of Shansky, ¶¶ 19, 20, 22).

**4. Marone Filed This Action During The "Limbo" Period.**

On May 2, 2013, Marone filed this action, while MATC was in the state of "limbo" regarding the permissible extent of collective bargaining highlighted by the Wisconsin Court of Appeals.. Marone asked the court to impose the following relief:

> A. A declaratory judgment stating that MATC violated Wis. Stats. §§ 111.70 and 66.0506 by entering into collective bargaining negotiations with Local 212 over prohibited topics;
>
> B. A declaratory judgment that the Labor Agreement approved on February 26, 2013, which is the product of the illegal collective bargaining, is unlawful, invalid and of no force and effect;
>
> C. A declaratory judgment that the conduct of MATC constitutes a per se unlawful agreement in restraint of trade in violation of Wis. Stat. § 133.03(1).[6]

(Compl., p. 9).

In her response to MATC's motion for judgment on the pleadings, Marone confirmed that the only relief she seeks is a declaration that the Conditional Successor Agreements are null

[6] *See, supra*, fn. 2.

and void:

> Ms. Marone does not seek any form of damages against MATC, nor does she seek any penalty against MATC or any MATC official. She seeks a declaration that the labor contracts negotiated between MATC and Local 212 in violation of Act 10 are null and void under two distinct theories.

(Pl's. Response Br. In Opposition To Milwaukee Area Technical College's Mot. For J. On The Pleadings, p. 4).

The case is ripe for summary judgment dismissing Marone's complaint as moot.

## LEGAL STANDARDS

Summary judgment should be granted when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Wis. Stat. §802.08; *Ewer v. Lake Arrowhead Ass'n, Inc.*, 2012 WI App 64, ¶12, 342 Wis. 2d 194, 817 N.W.2d 465. A material fact is such fact that would influence the outcome of the controversy. *Central Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178 (citation omitted). The purpose of summary judgment is to avoid trial when no triable issues exist. *Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. Once the party moving for summary judgment demonstrates that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law, the opposing party may avoid summary judgment only by setting forth specific evidentiary facts showing that there is a genuine issue for trial. *See Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860.

As a general rule, dismissal is warranted when the issues to be resolved in a controversy are moot. *State ex rel. La Crosse Tribune v. Circuit Ct. for La Crosse Cnty.*, 115 Wis. 2d 220, 228-29, 340 N.W.2d 460, 464 (1983). "An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which

circumstances have rendered purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425 (internal citations omitted). "It is generally thought to be in the interest of judicial economy not to continue to litigate issues that will not affect real parties to an existing controversy." *La Crosse Tribune*, 115 Wis. 2d at 228. "The purpose of a dismissal for mootness is simply to prevent an unnecessary expenditure of time by the court and the parties." *Wisconsin's Envtl. Decade, Inc. v. Public Service Comm'n, 79 Wis. 2d 161, 171, 255 N.W.2d 917, 924 (1977).*

## ARGUMENT

Marone's complaint should be dismissed, in its entirety, because the issues raised in the complaint are moot. The sole relief sought in this complaint is a declaration that MATC violated statutory prohibitions against bargaining over terms and conditions of employment other than base wages, and, as a result, that the part-time faculty Conditional Successor Agreement between MATC and Local 212 is illegal, invalid and void. (Compl. ¶¶ 34-43; p. 9). However, the controversy over whether MATC violated any statutory prohibitions or whether the agreement is illegal, invalid or void is moot for three reasons: (1) by its terms – and even if it had ever become an actual contract - the part-time faculty Conditional Successor Agreement has expired; (2) the parties to the proposed Conditional Successor Agreement agree that the contract never came into existence and, therefore, was never a binding, enforceable contract; and (3) the Conditional Successor Agreement never became a binding contract because a final draft was not agreed upon or executed by MATC and Local 212.

### 1. The Issues In Marone's Complaint Are Moot Because The Conditional Successor Agreement Has Expired And Marone No Longer Has A Legally Cognizable Interest In Resolution Of The Issues.

Marone's complaint must be dismissed in its entirety as moot because the proposed part-

time faculty Conditional Successor Agreement, by its terms, expired on February 15, 2015. Therefore, resolving the issues presented in Marone's Complaint for Declaratory Relief will have no practical effect on the parties' rights or obligations. Wisconsin state courts and federal courts recognize that parties' rights or obligations under an expired contract can be a moot issue because a plaintiff may no longer have a legally cognizable interest in an expired contract or the court's ruling may no longer affect a plaintiff's rights. *See Kabes v. Sch. Dist. of River Falls*, 2004 WI App 55, fn. 1, 270 Wis. 2d 502, 677 N.W.2d 667 (in general, a claim based upon an expired contract may be moot); *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008) (plaintiff lacked a legally cognizable interest in expired contracts and the court could not affect his rights; thus, claims were dismissed as moot); *Campbell Soup Co. v. Martin*, 202 F.2d 398, 398-99 (3d Cir. 1953) (where the contract expired and there no longer were any legal relations between the parties, issues related to whether a contract was enforceable were moot).

Marone asks the court to declare that MATC violated Wis. Stat. §§ 66.0506 and 111.70(4)(mb) by negotiating an agreement over prohibited subjects of bargaining. (Compl. ¶¶30-43; p. 9). As a result, Marone asks the court to declare that the Conditional Successor Agreement negotiated is unlawful, invalid and void. (Compl. ¶¶ 30-43; p. 9). Marone acknowledges that the purported contract at issue expired on February 15, 2015. (Compl. ¶ 23). However, Marone essentially asks this court to first find that the Defendants entered into a binding contract (that by its terms has expired) and to then declare that the expired contract was entered into illegally and - for this reason - that it is invalid and void.

Even if Marone could overcome the fact that the parties to the proposed part-time faculty Conditional Successor Agreement agree that it never came into existence, the exercise that Marone would have the court pursue is purely academic, because Marone no longer has any

legally cognizable interest in the expired contract. Marone has not claimed any damages suffered as a result of the Defendants negotiating the Conditional Successor Agreement or as a result of its purported existence. She merely seeks to have the contract declared illegal, invalid and void. However, whether it was valid or invalid, the alleged contract no longer could have any legal authority, be binding on Marone, or cause Marone any damages, as (if it had come into existence) it would have expired on February 15, 2015.

Consequently, a declaration on the question of whether a contract was formed, the negotiations were illegal, or the contract is illegal, invalid and void has no practical effect on Marone. The declaratory relief that Marone seeks would not affect her rights and, accordingly, Marone's complaint concerns moot issues that this court should not consider.

**2. The Issues In Marone's Complaint Are Moot Because The Proposed Conditional Successor Agreement Never Was And Never Will Be A Binding Contract.**

The issues in Marone's Complaint regarding the legality of MATC's negotiations with Local 212 and the legality of the proposed Conditional Successor Agreement also are moot because the Conditional Successor Agreement did not and never will become a binding contract. Under Wisconsin contract law, the part-time faculty Conditional Successor Agreement never became and never can become a binding contract because the Defendants - as parties to the Conditional Successor Agreement itself - agree that the Agreement did not ultimately become a binding contract, and its terms and conditions could not and would not be implemented.

This argument was raised by MATC and Local 212 in their joint motion to dismiss and for judgment on the pleadings. In this regard, the parties agreed that because the condition precedent to actually implementing the Conditional Successor Agreement did not occur (a finding that Act 10 was unconstitutional by the appellate courts), the Part-Time Conditional Successor Agreement did not come into being, and therefore was not a binding or enforceable

contract.

The court rejected this argument because MATC had not submitted evidence (as it could not submit evidence outside of the pleadings) "that MATC and Local 212 ever agreed to the Act 10-constitutionality contingency." (11/17/14 Decision & Order, p. 4) The court found "that Summary only constitutes MATC's view of the negotiations and cannot stand as evidence of Local 212's acceptance of the same contingency." (11/17/14 Decision & Order, p. 5).

However, on summary judgment MATC and Local 212 now are permitted to submit evidentiary support for their joint position, i.e., that MATC insisted as a condition of negotiations that the collective bargaining agreement for the period February 16, 2014 through February 15, 2015 would become a valid and enforceable contract *only if* Act 10 were declared unconstitutional. The undisputed facts show that prior to February 16, 2014, MATC and Local 212, the parties to the proposed Conditional Successor Agreement, agreed that contracts had not come into existence, in addition to the fact that the legal condition precedents were not ultimately satisfied at a later time. While MATC's and Local 212's bargaining teams discussed and tentatively agreed on the terms for a future contract, both parties agree that the Conditional Successor Agreement did not come into existence as a binding and enforceable contract. (Aff. of McColgan, ¶12) (Aff. of Shansky, ¶¶ 18-22).

Marone cannot refute this evidence and, ultimately, cannot seek to enforce (or in this case declare unenforceable) a contract to which she is not a party. Under established Wisconsin law, a contract cannot be enforced by a person not a party to it. *Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994); *Abramowski v. Wm. Kilps Sons Realty,* 80 Wis. 2d 468, 472, 259 N.W.2d 306, 308 (1977). Here, MATC and Local 212, as parties to the proposed Conditional Successor Agreement agree that no contract existed or was enforceable.

Moreover, Marone cannot rely on the theory that she is a third-party beneficiary to the Conditional Successor Agreement. It is true that a third-party beneficiary of a contract can seek to enforce a contract. *Goossen*, 189 Wis. 2d at 249. However, the practical implication in this case would be that, in order for Marone to obtain the relief she seeks (having the Conditional Successor Agreement declared illegal, invalid and void), this court would have to first engage in the exercise of determining Marone is a third-party beneficiary, determine that the Conditional Successor Agreements existed, determine whether MATC violated the law and then determine that the Conditional Successor Agreement is void and illegal as a result of the alleged violation. Such an exercise is an unnecessary expenditure of judicial resources when MATC and Local 212 agree that the proposed Conditional Successor Agreement never became binding and could not be enforceable.

Further, Marone's claim that MATC and Local 212 actually entered into and implemented a final contract for the 2014-2015 contract term cannot stand in light of the actual events of that year. In February of 2014, the previous collective bargaining agreement between MATC and Local 212 expired. Marone's complaint for declaratory judgment would have it that MATC then continued the previous collective bargaining agreement's terms and conditions, as modified by the Conditional Successor Agreement for the 2014-2015 contract year. However, in February of 2014, MATC immediately made changes that could not have been made if, in fact, MATC and Local 212 viewed the Conditional Agreement as an actual, binding collective bargaining agreement.

When the collective bargaining agreement expired in February of 2014, MATC immediately discontinued dues and fair share payroll deductions. Dues and fair share deductions had been part of the previous collective bargaining agreement and were continued as part of the

Conditional Successor Agreement for 2014-2015. Nevertheless, in spite of the fact that these union security provisions continued to appear on paper, they were never implemented because the Conditional Agreement was not a final collective bargaining agreement and appellate litigation concerning the status of Act 10 had not been concluded. (Aff. of McColgan, ¶13).

In addition, the previous collective bargaining agreement incorporated a contractual grievance procedure. The grievance procedure authorized Local 212 and employees covered by the contract to file grievances over alleged violations of the collective bargaining agreement. This grievance procedure was continued as part of the 2014-2015 Conditional Successor Agreement as well. However, during the course of that same 2014-2015 alleged contract term, MATC stopped processing grievances under the contractual grievance procedure and no longer provided the union or bargaining unit employees with access to binding arbitration. This could not have been the case if, in fact, MATC and Local 212 viewed the Conditional Successor Agreement as an actual collective bargaining agreement. (Aff. of McColgan, ¶14).

Further, in March of 2014, i.e., during the term of the 2014-2015 Conditional Successor Agreement, MATC began working on an employee handbook related to wages, hours, and conditions of employment for college employees, including employees in the part-time faculty bargaining unit, such as Marone. MATC began this process soon after the previous collective bargaining agreement expired in February of 2014. (Aff. of McColgan, ¶15). Working on and implementing a handbook to define wages, hours, and conditions of employment in a way that is inconsistent with an actual, current collective bargaining agreement would be a prohibited practice under Wis. Stat. §111.70(3)(a)1 and 4. It was not prohibited, however, because no collective bargaining agreement was in effect, nor would any such agreement have been in effect unless and until the Supreme Court concluded that Act 10 was unconstitutional.

The employee handbook development process lasted roughly nine (9) months and covered almost the entire duration of the 2014-2015 Conditional Successor Agreement. Work on the handbook concluded in December of 2014 and was approved by the MATC District Board in January of 2015. On February 24, 2015, the MATC District Board approved the January meeting minutes where the employee handbook was approved. (Aff. of McColgan, ¶15).

While the process of building an employee handbook for an institution the size of MATC did take time - and, as a result, MATC did not immediately and arbitrarily change each and every wage, hour, and working condition for the mere expedient of proving that it was not following a collective bargaining agreement – the College did make a number of changes from what appeared in the 2014-2015 Conditional Successor Agreement that Marone claims was a collective bargaining agreement. (Aff. of McColgan, ¶15). The fact that MATC did so with Local 212's acceptance, proves that it was not.

Therefore, the question that Marone presents depends on there being a contract in the first instance. Irrefutable evidence establishes that no contract existed. The issue she would have the court resolve is also a moot inquiry, however, because Marone has never sought the benefits of the alleged contract; instead she has merely sought to have it declared an actual contract notwithstanding its contingent character, and then – once manufactured – declared illegal and void.

The court does not need to address whether MATC violated the law because Marone's purpose in requesting such declarations was to have the Conditional Successor Agreement declared unlawful, invalid and void. As the parties to the Conditional Successor Agreement agree that a binding contract never came into existence (and the evidence show that they behaved accordingly), the determination of whether MATC violated the law is a purely academic question

without practical effect. *See State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3 (internal citations omitted).

### 3. The Issues In Marone's Complaint Are Moot Because The Conditional Successor Agreement Was Not Finalized And Executed.

Finally, the Conditional Successor Agreement never became a binding contract, as it was never finalized and executed by MATC and Local 212.

Under general contract law principles, if either party knows or has reason to know that the other party regards the agreement as conditional/or incomplete and intends that no obligation shall exist until the whole agreement has been reduced to another written form, preliminary negotiations and agreements do not constitute a contract. Restatement (Second) of Contracts § 27 cmt. b (1981). This principle applies to the exchange of writings during bargaining.

The Wisconsin Employment Relations Commission ("WERC") recognizes that tentative agreements reached by parties during negotiations do not become enforceable provisions of a labor agreement until the parties have reached agreement on a total and complete labor agreement, incorporating all of the tentatively agreed-upon terms and conditions. *See Ozaukee Cnty. Bd. of Supervisors, Personnel Committee*, Dec. No. 18384-A, p. 7 (WERC Jul. 1981); *see also City of Stevens Point, Local 484* Dec. No. 12639-A, 12652-B, pp. 10-11 (WERC Sept. 1974) (tentative agreements conditioned on certain terms that are never met are not considered a binding agreements and withdrawal of such a tentative agreement could not be considered bad faith bargaining). Furthermore, the WERC has also has explained that tentative agreements reached during bargaining can be conditioned on other procedural terms. *See City of Columbus (Police Department),* Dec. No. 27853-B, pp. 15-16 (WERC June 1995) (municipal employer lawfully made agreement be contingent on the review of contract language changes and advice of counsel). This court should give great deference to WERC's interpretation of what does, *and*

*does not*, constitute a binding labor agreement, given WERC's expertise in such interpretations. *See, generally, Mineral Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, ¶¶12-16, 251 Wis. 2d 325, 641 N.W.2d 701 (discussion of levels of deference to administrative agency decisions).

It is undisputed that final, binding contracts memorializing the terms of the proposed Conditional Successor Agreements were not executed, as confirmed by the parties to the proposed contracts. (Aff. of McColgan, ¶12); (Aff. of Shansky, ¶ 19). The MATC District Board voted to approve only the *tentative* agreement with Local 212, including the conditions concerning appellate litigation that defined whether it could be finalized, and authorized signatures by "the MATC District Board and Administration" on the approved agreement. (Compl., Ex. C). A final collective bargaining agreement containing the tentative agreements and with signatures by the MATC Board and Administration does not exist. (Aff. of McColgan, ¶12) (Aff. of Frank Shansky, ¶¶ 18, 19).

The undisputed facts set forth in this motion for summary judgment actually show that the only documents signed were tentative agreements regarding the terms and conditions that would make up the proposed Conditional Successor Agreement. (Aff. of McColgan, ¶¶9, 12, Ex. D); (11/17/14 Decision & Order, p. 4). Therefore, the part-time faculty Conditional Successor Agreement was not finalized and executed, and could not be a binding contract.

The fact that the Conditional Successor Agreement never became a binding contract negates any practical effect of having this court rule on whether such an agreement would be illegal, invalid or void. The court's determination as to whether the Defendants violated the law would be purely academic – an exercise that courts are not to undertake because it is a waste of judicial resources – because Marone's only purpose in seeking a declaration that the Defendants

violated laws in negotiating or entering into such an agreement is to have the agreement declared illegal, invalid or void.

As such, the remaining issues presented in Marone's First and Second Causes of Action, are moot and Marone's complaint should be dismissed.

## CONCLUSION

Marone's request for a declaration that MATC unlawfully entered into the part-time faculty Conditional Successor Agreement and that the Conditional Successor Agreement is unlawful, invalid and void must be dismissed as moot. The very terms of the Conditional Successor Agreement demonstrate it would have expired on February 15, 2015. A declaration by the court will also have no impact on the rights or obligations of Marone, the parties to the proposed Conditional Successor Agreement, MATC and Local 212 agree the part-time faculty Conditional Successor Agreement never became a binding contract and never can be a binding contract, and a final, binding version of any such contract was never agreed to or executed by the parties.

Dated: February 27, 2015

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