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June 17, 2015

Via Hand Delivery
Honorable Peter C. Anderson
Circuit Court Chambers, Branch 17
Dane County Courthouse, Room 6103
215 South Hamilton Street
Madison, Wisconsin 53703

RE: Norman Sannes v. Madison Metropolitan School District, et al.
Case No.: 15-CV-974

Dear Judge Anderson:

Enclosed is MMSD Defendants' Brief in Support of Motion to Strike. A copy is being sent to all counsel of record by email today, together with a copy of this letter. Thank you.

Very truly yours,

BOARDMAN & CLARK LLP

Sarah A. Zylstra

SAZ/ms
Enclosure
cc: Attorney Richard M. Esenberg (*w/enc., via email*)
Attorney Lester A. Pines (*w/enc., via email*)
Attorney Tamara B. Packard (*w/enc., via email*)

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

NORMAN SANNES,
5345 Queensbridge Road
Madison, WI 53714

Plaintiff,

v.

Case No.: 15-cv-974
Case Code: 30701
Declaratory Judgment

MADISON METROPOLITAN SCHOOL
DISTRICT BOARD OF EDUCATION,
MADISON METROPOLITAN SCHOOL DISTRICT
545 West Dayton Street, Room 110
Madison, WI 53703

and

MADISON TEACHERS, INC.,
821 Williamson Street
Madison, WI 53703

Defendants.

MMSD DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STRIKE

Plaintiff Norman Sannes ("Sannes") has brought a taxpayer action for a declaratory judgment that, among other things, the 2014-2015 and 2015-2016 collective bargaining agreements ("CBAs") between the Madison Metropolitan School District (the "District") and Madison Teachers Inc. ("MTI") violate the rights of teachers under Wis. Stat. § 111.70(2). Specifically, Sannes alleges that the CBAs violate teachers' statutory rights to refrain from union activities and to not pay union dues or any amount under a fair-share agreement. Sannes, however, does not have standing to raise these claims, even in his capacity as a taxpayer. To have standing to bring a declaratory judgment action regarding rights under a statute, a plaintiff must have suffered (or be threatened with) a direct injury that falls within the zone of interests

that the statute seeks to protect. Here, Sannes has alleged no injury to himself that is related to any of the alleged violations of teachers' rights. Even if he had, any such injury would not fall into the zone of interests that § 111.70(2) seeks to protect because that statute pertains to the rights of municipal employees, and Sannes does not allege to be a municipal employee. Finally, even though Wisconsin recognizes a taxpayer's standing to seek declaratory relief regarding governmental decisions that injure taxpayers, Sannes has not alleged the necessary type of injury to support such standing in regard to any of the alleged violations of the rights of teachers. Those allegations should therefore be stricken from his Complaint.

Background

On April 13, 2015, Sannes filed a Complaint against the District, the Madison Metropolitan Board of Education (the "Board"), and MTI, seeking declaratory relief on three issues:

> Plaintiff seeks a declaration that the 2014-2015 and the 2015-2016 collective bargaining agreements (the "CBAs") between the School District and MTI are unlawful, invalid and void on the grounds that (a) the CBAs are the product of unlawful collective bargaining in violation of Wis. Stat. § 111.70(4)(mb); (b) the CBAs contain terms that violate Wisconsin law; and (c) the CBAs violate the rights of teachers under Wis. Stat. § 111.70(2).

Compl. ¶ 1. With respect to the third issue, Sannes's Complaint included the specific allegations that the CBAs violate teachers' statutory rights under section 111.70(2) to refrain from union activities and to not pay union dues or any amount under a fair-share agreement. Compl., ¶¶ 11, 27, 30, 35, 43.

On May 11, 2015, the District and the Board (collectively, "MMSD") answered the Complaint and included a motion to strike Sannes's allegations regarding alleged violations of teachers' rights on the basis that Sannes lacked standing and any factual basis to make those allegations. Answer, at 1-2. Specifically, MMSD sought to strike paragraphs 1(c), 11, 30, 35,

43, and portions of paragraph 27 all of which included allegations regarding supposed violations of teachers' rights. MMSD asserted that Sannes's allegation that he is a taxpayer is inadequate to support any claim by Sannes based on these allegations. MTI joined in the motion to strike with its Answer, filed May 11, 2015. MTI Answer, ¶¶ 1, 11, 27, 30, 35, 43.

Legal Standard

Wisconsin Stat. §802.06(6) provides in relevant part that "[u]pon motion made by a party before responding to a pleading ..., the court may order stricken from any pleading any insufficient defense or any ... immaterial [or] impertinent ... matter." Whether a motion to strike should be granted is a question of law. *First Nat'l Bank v. Dickinson*, 103 Wis. 2d 428, 431-33, 308 N.W.2d 910 (Ct. App. 1981).

A plaintiff may not maintain a declaratory judgment action unless there is a "justifiable controversy," which exists when the following four requirements are met:

(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.

(2) The controversy must be between persons whose interests are adverse.

(3) The party seeking declaratory relief must have a legal interest in the controversy — that is to say, a legally protectable interest.

(4) The issue involved in the controversy must be ripe for judicial determination.

Chenequa Land Conservancy v. Village of Hartland, 2004 WI App 144, ¶ 11, 275 Wis. 2d 533, 685 N.W.2d 573 (quoting *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)). The third of these requirements is the requirement of standing. In order to have standing to bring an action for a declaratory judgment, a plaintiff "must have suffered or be threatened with an injury to an interest that is legally protectable, meaning that the interest is arguably within the zone of interests that [the statute at issue] seeks to protect." *Id.* ¶ 16. This is a two-part test under which a plaintiff must assert:

(1) Some threatened or actual injury (i.e., a personal stake in the outcome of the controversy); and

(2) A logical nexus between the status asserted and the claim sought to be adjudicated (i.e., that the provision on which the claim rests properly can be understood to grant people in the plaintiff's position a right to judicial relief).

State ex rel. First Nat'l Bank of Wis. Rapids v. M&I Peoples Bank of Coloma, 95 Wis. 2d 303, 308-09, 290 N.W.2d 321 (1980); *see also Foley-Ciccantelli v. Bishop's Grove Condo. Assn., Inc.*, 2011 WI 36, ¶¶ 54-55, 333 Wis.2d 402, 797 N.W.2d 789 (the "essence of the question of standing" is "whether there is an injury and whether the interest of the party whose standing is challenged falls within the ambit of the statute ... involved."); *Foley-Ciccantelli*, 2011 WI 36, ¶¶ 121-24 (Prosser, J., concurring). Therefore, for Sannes to seek a declaratory judgment pertaining to the rights of teachers under Wis. Stat. § 111.70(2), the allegations in his Complaint must establish (1) that ***he*** has suffered (or is threatened with) an actual injury and (2) that the injury is within the zone of interests protected by § 111.70(2).

Argument

The concept of standing is rooted in the idea that in order to pursue a lawsuit, an individual should have "'a personal stake in the outcome of the controversy.'" *State ex rel. First National Bank*, 95 Wis. 2d at 309 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, to have standing, "the plaintiff himself [must have] suffered some threatened or actual injury resulting from the putatively illegal action." *Id.* at 308 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (internal quotation omitted). In addition, when the action concerns a declaratory judgment regarding a particular statute, the plaintiff must also establish that the injury is of the type the statute is intended to protect against. *Chenequa Land Conservancy*, 2004 WI App 144, ¶ 16.

While Sannes may have standing to challenge government expenditures as a taxpayer, Sannes's allegations regarding violations of teachers' rights completely fail to meet either prong of the standing test. First, he neither asserts an injury personal to himself, nor does he assert that the alleged violations of teachers' rights involve expenditures of government funds, which may give rise to taxpayer standing. Second, even if Sannes had alleged some injury, that injury would not have a logical nexus with or fall within the zone of interests protected by Wis. Stat. § 111.70(2) because that statute protects the rights of teachers and other municipal employees, and Sannes has not alleged that he is a teacher or municipal employee.

I. Sannes does not have standing to pursue a declaratory judgment action regarding the rights of teachers because Sannes has not alleged any actual or threatened injury to himself, even as a taxpayer.

A. Sannes alleges no violation of his individual rights or any pecuniary injury to himself as an individual.

For an individual to have standing to bring a declaratory judgment action regarding statutory rights, those statutory rights must implicate his or her individual rights. *Chenequa Land Conservancy*, 2004 WI App 144, ¶ 17 ("The injury asserted must be such that it gives the plaintiff a personal stake in the outcome of the controversy."); *cf. Scharping v. Johnson*, 32 Wis. 2d 383, 395, 145 N.W.2d 691 (1966) ("It is familiar Wisconsin law that a party may not urge the unconstitutionality of a statute upon a point not affecting his rights."). Here, however, Sannes's allegations regarding teachers' rights relate to the rights of others. He is seeking a declaratory judgment that "the CBAs violate the rights of teachers under Wis. Stat. § 111.70(2)." Compl., ¶ 1. But Sannes does not allege that he is a teacher or that he is otherwise directly injured by any of the alleged violations of teachers' rights. As such, Sannes's Complaint fails to allege the type of injury necessary for him to pursue a declaratory judgment regarding the rights of teachers under § 111.70(2).

As noted above, Sannes's Complaint includes allegations related to three specific alleged violations of teachers' rights: (1) the right to refrain from union activities, (2) the right not to pay union dues, and (3) the right not to pay any amount under a fair-share agreement. Sannes's Complaint does not, however, include any allegations that would establish that these alleged violations of teachers' rights would interfere with ***his*** individual rights or cause ***him or any taxpayer*** any direct pecuniary harm. Nor could he, as each of these alleged violations is specific to ***teachers and what they pay***, and Sannes has not alleged that he is a teacher.

1. Sannes alleges no actual or threatened injury to himself.

Sannes asserts that he can pursue a declaratory judgment regarding the rights of teachers because this is a "taxpayer action." Compl., ¶ 1. It is true that Wisconsin recognizes that a taxpayer has standing to challenge governmental actions in certain circumstances. But "[a] taxpayer does not have standing to challenge [a governmental action] merely because he or she disagrees with the [governmental body]." *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 10, 256 Wis. 2d 859, 650 N.W.2d 81. Rather, to bring a taxpayer action, "the taxpayer must allege and prove a direct and personal pecuniary loss, ***a damage to himself different in character from the damage sustained by the general public.***" *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988) (emphasis added). Sannes has not done so. As such, the Complaint fails to establish taxpayer standing for Sannes to pursue his claims regarding the rights of teachers under § 111.70(2). *McClutchy v. Milwaukee County*, 239 Wis. 139, 141, 300 N.W. 224 (1941) ("It is fundamental that in order to maintain such an action the taxpayer and taxpayers as a class must have sustained or will sustain some pecuniary loss.").

2. Sannes does not allege that any violation of teachers' rights alleged in his Complaint will result in an increase in his taxes.

Wisconsin courts have found taxpayer standing where there is a challenge to a governmental action that will raise a taxpayer's taxes. *See, e.g., City of Appleton*, 142 Wis. 2d at 883-84. But Sannes's Complaint includes no allegation that any of the alleged violations of teachers' rights will cause an increase in his taxes. Moreover, as a matter of logic, none of alleged violations would do so, because the financial consequences (if any) suffered as a result of the alleged violations would be limited to the teachers themselves, and neither the District nor the Board (or any other governmental entity) would face a financial consequence as a result that harm. As such, there would be no potential for an increase in taxes due to any of the alleged violations of teachers' rights.

3. Sannes does not allege that any violation of teachers' rights will result in an expenditure of public funds.

Under Wisconsin law, taxpayers may be injured when their payment of taxes is used to fund unconstitutional expenditures. *See, e.g., Tooley v. O'Connell*, 77 Wis. 2d 422, 438-39, 253 N.W.2d 335 (1977) (challenge to a statute establishing the financing of Milwaukee public schools which required the expenditure of public funds); *Thompson v. Kenosha County,* 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974); *Kaiser v. City of Mauston,* 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994) ("A taxpayer does not have standing to challenge an ordinance merely because he disagrees with a legislative body .... An allegation that the city has spent, or proposes to spend, public funds illegally is, however, sufficient to confer standing on a taxpayer.").

It is likely that Sannes will argue that the alleged violations of teachers' rights would result in the unlawful expenditure of public funds, which would serve as a basis for taxpayer

standing. However, the specific allegations made in Sannes's Complaint that are being challenged by this motion to strike do ***not*** support his argument.

Sannes's allegations regarding the specific rights that will be violated by the CBAs all pertain to things that the ***teachers*** will be required to do. None of these allegations relate to anything that the District or the Board (or any other governmental entity) will be required to do. More specifically, there is no claim that the alleged violations of teachers' rights will cause the District or the Board (or any other governmental entity) to expend any public funds. Because Sannes's Complaint does not include any allegations that would indicate that the alleged violations of teachers' rights have or will result in any expenditure of public funds, Sannes cannot rely on this theory as a basis for taxpayer standing. This is a crucial distinction.

B. The potential for future litigation does not provide a basis for taxpayer standing.

Sannes also may argue that taxpayer standing exists because the alleged violations of teachers' rights identified in his Complaint "expose[ ] the School District to financial exposure for claims by teachers." Compl., ¶43. Presumably by "claims" he means litigation, though Sannes did not allege any specific threat of litigation from a teacher in his Complaint. A "remote" and "hypothetical" future injury, such as an alleged threat of possible future litigation, is not sufficient to support standing. *See Fox v. DHSS*, 112 Wis. 2d 514, 527, 334 N.W.2d 532 (1983) (finding no standing where the injuries alleged were "simply too remote to be considered 'direct injury'"). Rather,

> The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Id. at 525 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). The requirement of "real and immediate" harm is black letter law in Wisconsin, including in regard to alleged future harm.

Moreover, courts that have addressed the issue of whether the threat of future litigation is a sufficient basis to establish the type of direct injury that would confer standing have held that it is not. *See, e.g.*, *Berger v. Weinstein*, 348 Fed. Appx. 751, 756 (3d Cir. Oct. 9, 2009) (unpub.) ("Any injury to [the plaintiff] that may result from a potential future lawsuit is hypothetical and cannot confer Article III standing."); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 157 (1990)) ("Allegations of injury based on predictions regarding future legal proceedings are, however, 'too speculative to invoke the jurisdiction of an Article III Court.'"); *County of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 998-99 (D. Minn. 2003) ("On the other hand, an amorphous threat of future liability alone does not result in injury. If such an inchoate claim could support standing, a court could intervene whenever any entity faced the possibility of future litigation.").

Sannes's assertion of possible future litigation from teachers is particularly speculative as no teacher has yet sued the District despite the fact that the parties have almost completed one set of the challenged CBAs and the supreme court's ruling came down nearly a year ago. Sannes's assertion of injury by possible future litigation, like the injuries asserted by the plaintiffs in *Fox*, is too remote to confer standing: "His claimed injuries will result only if a sequence of increasingly unlikely events actually occur." *Fox*, 112 Wis. 2d at 529. Therefore, Sannes's allegation that the violations of teachers' rights alleged in his Complaint raise a threat of future claims from teachers is not sufficient to establish taxpayer standing.

II. Even if Sannes had alleged an actual injury, he still would not have standing, because any alleged injury to Sannes would lack the necessary nexus with the rights of teachers under § 111.70(2).

For a plaintiff to have standing to pursue a declaratory judgment action regarding the rights of the parties under a statute, there must be a "logical nexus between the status asserted

and the claim sought to be adjudicated." *State ex rel. First Nat'l Bank of Wis. Rapids*, 95 Wis. 2d at 309. This "logical nexus" requirement means that "the actual or threatened injury [must] be to an interest that is arguably protected by the statutory or constitutional law upon which the plaintiff bases the claim for relief." *Chenequa Land Conservancy*, 2004 WI App 144, ¶ 16. In this case, Sannes cannot meet this requirement in regard to any rights protected by § 111.70(2).

Section 111.70(2) is titled "Rights of Municipal Employees," and that is precisely what it aims to protect; it does not address rights of private citizens. Sannes has not alleged that he is a teacher (or any other type of municipal employee). This means that any injury to him would necessarily fall outside of the "zone of interest" that § 111.70(2) seeks to protect. *See Chenequa Land Conservancy*, 2004 WI App 144, ¶ 16.

III. The circuit court's ruling in *Blaska v. MMSD* does not mandate a different result.

The plaintiff's counsel, Wisconsin Institute for Law and Liberty, previously filed a similar suit against these same defendants on behalf of a different taxpayer. *David Blaska v. Madison Metropolitan School District Bd. of Educ. et al.*, Dane County Case No. 14-CV-2578. That case is currently pending before the Honorable Richard G. Niess. The parties have filed cross motions for summary judgment, and reply briefs in the matter are due June 22, 2015.

In *Blaska*, defendants sought to strike similar allegations from Blaska's complaint as were alleged by Sannes here, and such motion was denied by the court. The court held that the allegations were material as part of plaintiff's showing that he has or will sustain some pecuniary harm for two reasons.[1] First, the court said that the plaintiff was alleging that certain public expenditures violate Wisconsin law, such as administration expenses for dues deductions for MTI. Second, the court said that plaintiff had alleged that any teacher harmed by the illegal

[1] A copy of that decision is attached as Exhibit A.

collective bargaining agreement had the potential to bring a claim against MMSD. Respectfully, the circuit court's reasoning is incorrect for several reasons, and should not be followed by this Court.

A. The Circuit Court in *Blaska* Failed to Recognize the Distinction Between Allegations of Illegal Expenditures and Allegations of Teacher Rights Violations.

First, the circuit court in *Blaska* denied a similar motion to strike as the one now made here reasoning that plaintiff alleged certain public expenditures violate Wisconsin law, such as administration expenses for dues deductions for MTI. But that ignores that Blaska himself, just like Sannes here, pled that it is ***teachers*** who are "being forced to pay" union and fair-share dues contrary to law and "against their wishes." Compl., ¶ 11. Blaska made no claim, nor does Sannes, that the District is paying these things. Accordingly, those expenditures are not a taxpayer issue. Neither Blaska nor Sannes as non-teachers have the authority to stand in the shoes of teachers and assert their rights. That is precisely what each is seeking to do. As to these allegations, this is not a taxpayer seeking to mind the fiscal purse. Instead, these allegations demonstrate a taxpayer disagreeing with the decisions of a governmental body. That does not confer standing. *Village of Slinger*, 2002 WI App 187, ¶ 10; *City of Appleton*, 142 Wis. 2d at 877 ("the taxpayer must allege and prove a direct and personal pecuniary loss, ***a damage to himself different in character from the damage sustained by the general public***.") (emphasis added).

The circuit court in *Blaska* came to the wrong conclusion by failing to distinguish among those paragraphs defendants were seeking to strike from the complaint and those they were not. Defendants did not seek to strike the paragraphs that referenced illegal expenditure of funds. The paragraphs defendants sought to strike in *Blaska* related to a very narrow issue: can plaintiff, who is not a teacher, assert a separate and distinct violation of teachers' rights that does

not involve public expenditures? The same issue is presented here. The rights allegedly violated in both lawsuits relate to the rights of teachers to refrain from union activity, not pay union dues, and not pay any amount under any fair-share agreements. *See, e.g.*, Compl. ¶11; MMSD Answer ¶11; MTI Answer ¶11. These allegedly illegal payments and actions by definition will be made by ***teachers.*** None of them will result in expenditures by the District. Indeed, just like Blaska, Sannes has pled that the so-called rights he seeks to enforce are to prohibit "non-union teachers being forced to pay union dues against their wishes." Compl., ¶11. But whether ***teachers*** pay those dues or not does not implicate ***public*** funds.

B. The Circuit Court in *Blaska* Erred on the Future Litigation Issue.

In *Blaska,* the circuit court's second ground for denying the motion to strike was that a teacher might bring suit in the future and thereby expose the District to the costs of defending a future lawsuit. The court was uncertain as to the applicability of the federal cases cited by defendants, which held such allegations do not confer standing, and reasoned that those cases did not merit consideration because the risk of future litigation was not the only ground supporting standing, referring to the public expenditure argument discussed above.

In the federal cases cited in section I.B. above, those courts specifically found that the chance that litigation could be brought in the future was too speculative to confer standing. To be sure, the federal cases defendants cited in *Blaska* and above are not binding authority. At the same time, simply because Wisconsin has not yet considered the precise issue presented is not a basis for denying the motion. The same general principle, that remote injuries cannot confer standing, exists in Wisconsin law. *See Fox v. DHSS*, 112 Wis. 2d 514, 527, 334 N.W.2d 532 (1983) (finding no standing where the injuries alleged were "simply too remote to be considered 'direct injury'"). Indeed, the Wisconsin Supreme Court in *Fox* specifically cited and quoted *Los*

Angeles v. Lyons, 461 U.S. 95, 101-02 (1983), a federal case from outside its jurisdiction, for its discussion of an "abstract" injury and whether it is sufficient to confer standing. The court in *Fox* also cited several other federal cases and relied on them for its analysis. Thus, the federal cases defendants cite above should be highly persuasive.

Moreover, every day that goes by makes the possibility that a teacher will bring the lawsuit Sannes imagines even more remote. Even if that possibility was not very remote by the time the circuit court considered the question in *Blaska*, it has become exceedingly remote now, which is the principle consideration under *Fox*. In *Fox*, the District Attorney for Milwaukee County (McCann) sought to challenge whether the Final Environmental Impact Statement (FEIS), which had been prepared for a proposed maximum security prison in Portage, was adequate. McCann argued that placing a prison in Portage would disrupt the lives of inmates from Milwaukee because they would be farther away from their families, making visitation more difficult. He also claimed that this would lead to an increase in the rate of recidivism. He indicated that approximately one-half of the inmates in the correctional system were from Milwaukee County, and that an increase in the recidivism rate would increase the crime rate there. He argued that this would injure him in his official capacity as the Milwaukee County District Attorney. *Id.* at 526-27.

The Wisconsin Supreme Court held that McCann did not have standing to challenge the FEIS. *Id.* at 529. In denying standing, the court stated:

> McCann's claims of injury are simply too indirect and speculative to confer standing on him to challenge [the FEIS]. Further, the claims of injury do not bear a close causal connection to a change in the physical environment.
>
> Standing must ultimately rest on a showing, or at least an allegation, of direct injury or a real and immediate threat of direct injury. None of McCann's claims reach this level. He has not alleged or demonstrated any causal relationship between his "injuries" and a change in the physical environment. His claimed

> injuries will result only if a sequence of increasingly unlikely events actually occur. Under these conditions, we cannot conclude that McCann has or will suffer an injury sufficient to confer standing on him to bring this action.

Id.

The same is true here as to Sannes's allegations of a speculative future teacher suit. The first set of CBAs are nearly completed and there has been no such suit. At the time that the initial briefs were filed on this issue in *Blaska*, the parties were only four months into the first school year as opposed to at the end of it. Sannes's claim of future litigation is far more speculative now than at the time the circuit court in *Blaska* considered the issue.

The *Blaska* court's suggestion that it need not consider the federal cases that defendants cited is not deserved given the supreme court's approach in *Fox*. Accordingly, defendants respectfully submit that the circuit court's reasoning in *Blaska* is incorrect and should not be followed here.

Conclusion

For the reasons stated above, Defendants respectfully request that the Court grant their motion to strike from plaintiff's complaint 1(c), 11, 30, 35, 43, and portions of paragraph 27 relating to deductions of union dues, fair-share payments and the like.

Dated this 17th day of June, 2015.

BOARDMAN & CLARK LLP
By

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STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

DAVID BLASKA,

Plaintiff,

v.

Case No. 14 CV 2578

MADISON METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT, and MADISON TEACHERS, INC.,

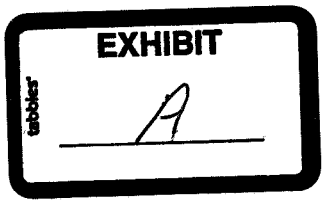
Defendants.

DECISION AND ORDER DENYING DEFENSE MOTION TO STRIKE

STATEMENT OF THE CASE

Plaintiff David Blaska is a taxpayer in the Madison Metropolitan School District.[1] In that capacity, he sues for a declaratory judgment under § 806.04, Stats., and for an injunction under § 813.02, Stats., addressing the 2015-2016 collective bargaining agreements between defendants Madison Metropolitan School District and Madison Metropolitan School District Board Of Education, on the one hand, and defendant Madison Teachers, Inc., on the other. He alleges the collective bargaining agreements are "unlawful, invalid and void" because they (1) are the product of unlawful collective bargaining under §111.70 (4) (mb), Stats., (2) contain terms that violate Wisconsin law, and (3) violate the rights of teachers under §111.70 (2).

[1] Because this decision addresses defendants' motion to strike, the factual allegations in the complaint, and all reasonable inferences therefrom, are assumed to be true and form the context for the motion. *First Nat. Bank of Wisconsin Rapids v. Dickinson*, 103 Wis. 2d 428, 432 (Ct. App. 1981).



Under § 802.06 (6), Stats., defendants move to strike paragraphs 1 (c), 11, 28, 33, 41, and portions of paragraph 25 of the Complaint. These allegations generally allege rights enjoyed by Madison Metropolitan School District teachers, and injuries to those rights caused by the collective bargaining agreements at issue.

Specifically, the allegations defendants seek to strike are:

> 1.
>
> ...
>
> (c) the CBAs violate the rights of teachers under Wis. Stat. § 111.70 (2)
>
> ...
>
> 11. Pursuant to Act 10, teachers have the right, among other things, to (a) refrain from union activity, (b) not pay union dues, and (c) not pay any amount under any so-called "fair share" agreements, i.e. non-union teachers being forced to pay union dues against their wishes.
>
> ...
>
> 28. Under Wis. Stat. § 111.70 (2) teachers have the right to refrain from union activities, the right to refrain from paying union dues and the right not to be bound by a so-called "fair share" agreement.
>
> ...
>
> 33. In addition, the CBAs violate Wis. Stat. § 111.70 (2) by forcing teachers to pay union dues or "fair share" payments even if the teacher does not want to belong to the union.
>
> ...
>
> 41. In addition, the CBAs require School District employees covered under the CBAs to pay union dues or "fair share" payments in violation of Act 10 and prohibit them from negotiating their own terms and conditions of employment. Continuing to implement the CBAs exposes the School District to financial exposure for claims by teachers for violation of this provision.

Additionally, defendants move to strike "portions of paragraph 25 relating to deductions of union dues, fair share payments and the like..." (Defendants' Motion to Strike, Answer and Affirmative Defenses, page 1.)

The motion to strike has been fully briefed. Oral argument has not been requested nor is it necessary. The motion is thus ripe for resolution and is DENIED for the following reasons.

ANALYSIS AND DECISION

Defendants ground their motion to strike on the law of standing. More particularly, they argue that because plaintiff is neither a teacher nor an employee in the Madison Metropolitan School District, "he therefore lacks both standing and a factual basis on which to assert those allegations." (Defendants' Motion to Strike, Answer and Affirmative Defenses, page 1.)

Defendants' motion misconstrues the purpose of plaintiff's harm-to-teachers allegations. Plaintiff makes no claim as a teacher, nor on behalf of the teachers, and therefore whether he has standing to make such a claim is beside the point.

Rather, plaintiff alleges standing as a taxpayer, which provides the setting in which the defense motion to strike must be evaluated pursuant to § 802.06 (6), which reads:

> **(6) Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, scandalous, or indecent matter. If a defendant in the action is an insurance company, if any cause of action raised in the original pleading, cross-claim, or counterclaim is founded in tort, or if the moving party is the state or an officer, agent, employee, or agency of the state, the 20-day time period under this subsection is increased to 45 days.

Defendants characterize the harm-to-teacher allegations as "immaterial, impertinent, and scandalous" to plaintiff's claims. (Defendants' Motion to Strike, Answer and Affirmative Defenses, page 2.)[2]

However, as seen from what follows, the allegations are neither "impertinent" nor "immaterial" given plaintiff's status as a taxpayer litigant, and the gravamen of plaintiff's complaint.

Taxpayer Standing: To satisfy standing requirements in a declaratory judgment action under Wisconsin law, a taxpayer need only show he has sustained, or will sustain, some pecuniary loss, however infinitesimal. *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21 (Wis. 1961). Thus, standing is a *material* issue upon which plaintiff bears the burden of proof and persuasion. The harm-to-teachers allegations are included in the Complaint

[2] They understandably make no argument demonstrating the "scandalous" nature of the allegations because there is none to be made. Thus, this contention will be considered no further. On the other hand, the teacher allegations are somewhat "redundant", although not enough to justify a motion to strike, which is probably why the defense ignored this argument as well.

as part of the plaintiff's showing that he has or will sustain some pecuniary loss sufficient for standing as a taxpayer. That is, the allegations are *relevant* to proving the *material* issue of standing. This is true for at least two reasons.

First, plaintiff alleges that certain public expenditures pursuant to the collective bargaining agreements violate Wisconsin law. Some of these involve administration expenses for dues reductions for defendant Madison Teachers, Inc.

> Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. This is because it results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit. Bechthold v. City of Wauwatosa (1938), 228 Wis. 544, 550, 277 N.W. 657, 280 N.W. 320. In Wagner v. City of Milwaukee (1928), 196 Wis. 328, 330, 220 N.W. 207, 208, it was stated:
>
> 'The illegal disbursement of this money would constitute an invasion of the funds of the city in which each individual taxpayer has a substantial interest, notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation. *The fact that the ultimate pecuniary loss to the individual taxpayer may be almost infinitesimal is not controlling.*' (Emphasis supplied.)

Id. at 22.

Second, plaintiff alleges that any teacher harmed by the expenditures of public funds pursuant to the illegal collective bargaining agreements has a potential cause of action against the Madison Metropolitan School District for damages which, along with the attendant litigation expenses and attorneys fees, would harm all taxpayers, including plaintiff. Defendants cite several cases from jurisdictions other than Wisconsin for the proposition that standing cannot be predicated upon the threat of future litigation alone. Beyond the fact that these cases have exceedingly dubious applicability here,[3] they merit no further consideration because, as set forth above, the potential for future litigation is not the sole or even primary basis for plaintiff's alleged standing.

As clearly relevant to the material issue of standing, the harm-to-teachers allegations are not properly the subject of a motion to strike. Moreover, it cannot be reasonably disputed that plaintiff's Complaint as a whole easily clears the low hurdle for taxpayer standing under Wisconsin law.

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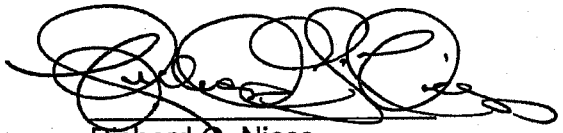
[3] All three cases cited address federal court standing under Article III of the United States Constitution, which is a qualitatively different analysis from Wisconsin taxpayer standing. Moreover, none of the cases involves taxpayer standing.

Plaintiff's Theory of the Case: Another basis for denying the motion to strike the teacher allegations is the nature of plaintiff's claims for relief, i.e., declaratory judgment on the illegality of the subject collective bargaining agreements, and injunction prohibiting their continued enforcement. For plaintiff to carry his burden of proof, he must adduce evidence in support of his claims. Under plaintiff's theory, some payments under the collective bargaining agreements to or on behalf of the teachers violate Wisconsin law. Worded differently, the teacher allegations are *pertinent*, i.e., relevant, to the *material* liability issues at the heart of plaintiff's case. They are thus not appropriately stricken.

Dated this 9th day of February, 2015.

BY THE COURT



Richard G. Niess
Circuit Judge

CC: Counsel of record