boardman & clark llp
LAW FIRM

Sarah A. Zylstra, Attorney

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June 22, 2015

Via Hand Delivery
Honorable Richard G. Niess
Circuit Court Chambers, Branch 9
Dane County Courthouse
215 South Hamilton Street
Madison, Wisconsin 53703

RE: David Blaska v. Madison Metropolitan School District Board of Education, et al.
Case No.: 14-CV-2578

Dear Judge Niess:

On behalf of Madison Metropolitan School District Boardman of Education and Madison Metropolitan School District, I enclose for your consideration the following materials:

1. Motion to Determine the Sufficiency of the Answers and Objections to MMSD's Requests to Admit and Deem Them Admitted or, in the Alternative, to Compel;
2. Brief in Support of Motion to Determine the Sufficiency of the Answers and Objections and Deem Admitted MMSD's Requests to Admit or, in the Alternative, to Compel;
3. Affidavit of Sarah A. Zylstra; and
4. Reply in Support of MMSD's Motion for Summary Judgment.

Copies are being served on 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
Enclosures

cc: Attorney Richard M. Esenberg (*w/encs., via email*)
Attorney Brian McGrath (*w/encs., via email*)
Attorney Stacy Stueck (*w/encs., via email*)
Attorney Lester A. Pines (*w/encs., via email*)
Attorney Tamara B. Packard (*w/encs., via email*)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

DAVID BLASKA,

Plaintiff,

v.

Case No.: 14-cv-2578
Case Code: 30701
Declaratory Judgment

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

Defendants.

MOTION TO DETERMINE THE SUFFICIENCY OF THE ANSWERS AND OBJECTIONS TO MMSD'S REQUESTS TO ADMIT AND DEEM THEM ADMITTED OR, IN THE ALTERNATIVE, TO COMPEL

To: Attorney Richard M. Eisenberg
Attorney Brian McGrath
Wisconsin Institute for Law & Liberty, Inc.
1139 East Knapp Street
Milwaukee, Wisconsin 53202

PLEASE TAKE NOTICE that defendants Madison Metropolitan School District Board of Education and Madison Metropolitan School District (collectively "MMSD"), by their attorneys, Boardman & Clark LLP, hereby move the Court, the Honorable Richard G. Niess presiding, pursuant to Wis. Stat. §804.11(1)(c) and Wis. Stat. § 804.12 to determine the sufficiency of the answers and objections to MMSD'S requests to admit and for an Order deeming those requests admitted. In the alternative, MMSD moves to compel answers to those requests to admit. MMSD also moves for its costs and fees for bringing this motion. The Motion will be heard before the Honorable Richard G. Niess, Dane County Circuit Court, 215 South Hamilton Street, Madison, Wisconsin 53703, at a date and time to be set by the Court.

The Motion is supported by the brief submitted herewith and the Affidavit of Attorney Sarah Zylstra.

Dated this 22nd day of June, 2015.

Respectfully submitted,

BOARDMAN & CLARK LLP
By

Sarah A. Zylstra, State Bar No. 1033159
Andrew N. DeClercq, State Bar No. 1070624
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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

DAVID BLASKA,

Plaintiff,

v.

Case No.: 14-cv-2578
Case Code: 30701
Declaratory Judgment

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

Defendants.

BRIEF IN SUPPORT OF MOTION TO DETERMINE THE SUFFICIENCY OF THE ANSWERS AND OBJECTIONS AND DEEM ADMITTED MMSD'S REQUESTS TO ADMIT OR, IN THE ALTERNATIVE, TO COMPEL

Introduction

Defendants the Madison Metropolitan School District (the "District") and the Madison Metropolitan School District Board of Education (the "Board") (collectively, "MMSD") move this Court pursuant to Wis. Stat. §§ 804.11(1)(c) and 804.12 to determine the sufficiency of plaintiff's answers and objections to MMSD'S requests to admit and for an Order deeming those requests admitted. In the alternative, MMSD moves to compel answers to those requests to admit. As shown below, plaintiff's objections to relevance are not well-founded as the requests go directly to the notice of claim issue presently being briefed on summary judgment and to defendants' real-party-in-interest defense. Further, plaintiff's objections on grounds of attorney-client privilege to two of five requests are equally without merit because the requests seek admissions about the letters that plaintiff's counsel, the Wisconsin Institute for Law and Liberty ("WILL"), has put before this Court and relied on for a defense and, therefore, any privilege as to

the circumstances of the documents has been waived. Finally, plaintiff's responses also fail to conform to Wis. Stat. § 804.11.

Background Facts

On May 4, 2015, MMSD served five requests to admit on plaintiff and a corresponding interrogatory requesting an explanation to the extent any of the requests were denied. Zylstra Aff., Ex. A. On June 1, 2015, plaintiff served his responses and essentially refused to answer the substance of the requests for admission. Zylstra Aff., Ex. B. The five requests to admit and their answers were as follows:

REQUESTS TO ADMIT

REQUEST NO. 1: Admit that the Wisconsin Institute for Law & Liberty ("WILL"), which represents you in this lawsuit, is a 501(c)(3) nonprofit organization.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. §804.01. Subject to this objection and without waiving it, the Plaintiff does not know the tax status of WILL.

REQUEST NO. 2: Admit that WILL does not pay taxes in the Madison Metropolitan School District.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. §804.01. Subject to this objection and without waiving it, the Plaintiff does not know whether WILL pays taxes in the Madison Metropolitan School District.

REQUEST NO. 3: Admit that at the time WILL sent the letters, copies of which were attached to your complaint (i.e., the October 3, 2013 letter to Jennifer Cheatham and the May 15, 2014 letter to the School Board Members of the Madison Metropolitan School District), you had not retained WILL to represent you.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. §804.01 and seeks information protected by the Attorney-Client privilege.

REQUEST NO. 4: Admit that the following statement appears on WILL's website: "WILL is a nonprofit organization. We provide all of our services — litigation, legal advice, and education at no cost to our clients."

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. §804.01. Subject to this objection and without waiving it, the Plaintiff does not know if that statement is on WILL's website because the Plaintiff has not recently reviewed WILL's website.

REQUEST NO. 5: Admit that WILL is bearing all of the expense of this lawsuit for you as the plaintiff, including the cost of having attorneys represent you.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. §804.01. Further, the terms of the engagement between Plaintiff and his counsel is protected by the Attorney-Client privilege.

Zylstra Aff., Ex. B.

On June 9, 2015, MMSD served a letter on plaintiff to meet and confer regarding the discovery responses. Zylstra Aff., Ex. C. Defendants explained why the answers were insufficient and did not comply with Wis. Stat. § 804.11. On June 12, plaintiff responded by letter and stood on his objections. Zylstra Aff., Ex. D. As explained below, plaintiff's objections are not well founded, and his answers to the discovery are evasive and incomplete.

Argument

1. Legal Standard for Determining Sufficiency of Admission Response.

Wisconsin Stat. § 804.01(2)(a) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." Wisconsin Stat. § 804.11 allows a party to serve on another party a written request for admissions as to the truth of facts, the application of law of the facts, and the genuineness of identified documents. Requested admissions are admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the requesting

party a written answer or objection signed by the responding party or the party's attorney. Wis. Stat. § 804.11(1)(b).

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. In this regard, Wis. Stat. § 804.11(1)(c) provides as follows:

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with this section, it may order either that the matter is admitted or that an amended answer be served. . . .

If a party fails to answer requests for admission by providing evasive or incomplete responses, the other party may move for an order compelling the requested discovery. Wis. Stat. § 804.12. Indeed, Wis. Stat. § 804.12(1)(b) indicates that an evasive or incomplete answer is to be treated as a failure to answer. Any matter admitted under § 804.11 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Wis. Stat. § 804.11(2).

2. All of Plaintiff's Responses are Improper, Evasive, and Insufficient.

a. Plaintiff's relevancy objections are meritless.

For all five of the requests to admit, plaintiff has objected that these requests exceed the scope of discovery set forth in Wis. Stat. § 804.01. In the corresponding interrogatory, plaintiff supports this assertion by arguing that the information sought is not relevant. That is incorrect.

Plaintiff has specifically argued that the letters that were attached to the complaint and sent by WILL to the District in 2013 and 2014 constitute actual notice to the District such that plaintiff need not comply with portions of the notice of claim statute, Wis. Stat. § 893.80. However, those letters do not demonstrate on their face that they were sent on behalf of David Blaska ("Blaska"), the plaintiff. Rather, they were sent by WILL, apparently on its own behalf;

no client was identified in the letters. Defendants believe that WILL is a 501(c)(3) nonprofit organization that does not pay taxes in the Madison Metropolitan School District. Further, defendants believe that at the time that the letters were sent, WILL did not represent Blaska and did not offer those documents to the District on behalf of Blaska. These facts are important because only a taxpayer in the District could arguably have taxpayer standing to bring a claim against the District. When WILL presented the letters to the District, it presented them as a non-profit and non-taxpayer of the District. Thus, there was no reason for the District to believe that a suit could be brought by WILL.

As MMSD's reply brief in support of its motion for summary judgment will demonstrate, under the Notice of Claims Statute (Wis. Stat. § 893.80), the District has the right to know whom the claimant is for it to be charged with actual notice and allow it to determine whether the claim is viable. The questions in the requests to admit satisfy the low barrier of relevance for purposes of addressing the argument made by Blaska that WILL's letters to the District constitute actual notice of ***his*** claim.

Additionally, as to requests 4 and 5, which seek to establish that WILL and not Blaska is bearing the expense of this lawsuit, that information is relevant for two reasons. First, it supports the notice of claim argument above. Second, MMSD also alleged as a defense that Blaska is not the real party in interest in this case. The letters sent and relied upon by WILL demonstrate that WILL is the real party in interest, but because it did not have standing to bring this action due to its non-taxpayer status, it needed Blaska to bring the suit. Yet Blaska had not complained to the District or indicated his intention to bring suit prior to the suit being filed. It was WILL that complained that it was unhappy with MMSD's actions and apparently later found someone with arguable taxpayer standing to bring this suit. Requests to admit 4 and 5 satisfy the low barrier of

relevance for purposes of the real party in interest defense, in addition to being relevant to the notice of claim defense.

b. Plaintiff's attorney-client privilege objections are meritless.

With respect to Request No. 3 and Request No. 5, Blaska objects that the information sought is protected by the attorney-client privilege. These objections are not well founded.

Request No. 3 asked Blaska to admit that at the time WILL sent the letters to the District, he had not retained WILL to represent him. First, the fact that Blaska is a client of WILL is certainly not privileged as it is disclosed on every pleading filed with this Court. Second, and more importantly, Blaska has put the letters that WILL sent to the District at issue and has attached them to the complaint in this matter. He has also asserted that "Plaintiff's counsel" sent those letters. *See, e.g.*, Blaska Resp. to Summ. J. at 25 ("Despite the notice from ***Plaintiff's counsel*** . . . ." referring to one of Attorney Eisenberg's letters) (emphasis added). It is MMSD's position that the letters were not from "***plaintiff's*** counsel" at the time that they were sent. Rather, they were simply letters from a non-profit and non-taxpayer organization, WILL. If, as MMSD suspects, WILL did not represent Blaska at the time that it sent its letters, then the letters are not notice to the District of a particular claimant who had the requisite qualifications to bring a claim against the District.[1]

With Blaska having put those letters at issue in this lawsuit and having strenuously argued that those letters constitute notice to the District from "plaintiff's counsel," MMSD is entitled to information about the circumstances of those letters and any privilege associated with the timing of representation has been waived. See, e.g., State v. Hydrite Chemical Co., 220 Wis. 2d 51, 68-69, 582 N.W.2d 411 (1998) (party impliedly waives the attorney-client privilege

[1] If, instead, WILL did represent Blaska at the time that it sent its letters, then it failed to disclose to the District the name and identity of the claimant as required by Wis. Stat. § 893.80, the notice of claim statute, and for that reason the notice requirements were not met.

when he places a claim or defense at issue and the document or information in question has a direct bearing on that claim or defense.)

Finally, for Request No. 5, defendants asked plaintiff to admit that WILL was bearing all the expense of the lawsuit. The plaintiff objected that this information was irrelevant and protected by the attorney-client privilege. Neither is the case. First, whether WILL is bearing the expense of the lawsuit is not a confidential communication under Wis. Stat. § 905.03(2) as it does not involve the giving of legal advice. See § 905.03(2) ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications *made for the purpose of facilitating the rendition of professional legal services* to the client . . . .") (emphasis added). Second, the issue of who is bearing the expense in this lawsuit goes to whether Blaska or WILL is the real party in interest in this lawsuit.

c. Plaintiff's answers fail to conform to Wis. Stat. § 804.11.

While Blaska objected to answering the requests to admit, he provided an answer anyway in Responses 1, 2, and 4. Those answers, however, violate Wis. Stat. § 804.11. In each of those responses, Blaska said that he does not know the information to be able to respond to the request to admit. That is improper.

Wisconsin Stat. § 804.1(1)(b) provides, "An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny." Blaska's lack-of-knowledge answer violates this provision. This specific issue was pointed out to counsel for Blaska in the meet-and-confer letter sent on June 9, 2015. Zylstra Aff., Ex. C.

For these requests to admit, the information is easily and readily known by Blaska's counsel if not Blaska himself. Indeed WILL's attorneys who are appearing in this matter on behalf of Blaska know whether WILL is a non-profit organization, know whether WILL pays taxes in the Madison Metropolitan School District, and know whether WILL has had statements on its website that WILL provides its services at no cost to its clients. The rules surrounding requests for admission do not let a plaintiff close his eyes to what his counsel readily knows.

In responding to MMSD's objections to the adequacy of his responses, Blaska argues in his letter that the rules do not require him to conduct an investigation or to go look things up. Zylstra Aff., Ex. D at 2. Yes, they do. It is right within the text of the rule. It says that an answering party may not give lack of knowledge as an answer unless the party "has made reasonable inquiry" and that "the information known ***or readily obtainable*** by the party is insufficient to enable the party to admit or deny." Wis. Stat. § 804.11(1)(b). Despite being apprised of the specifics of the rule requiring that a party make reasonable inquiry, Blaska has still refused to update or supplement his responses to these requests to admit. For that reason, these matters should be deemed admitted.

Conclusion

For the above reasons, MMSD requests that the Court determine the sufficiency of the answers and objections to the requests to admit. Plaintiff's answers do not comply with Wis. Stat. § 804.11. Accordingly, defendants request the court order these matters admitted. In the alternative, the defendants request that their motion to compel be granted and fees be awarded for this motion.

Dated this 22nd day of June, 2015.

BOARDMAN & CLARK LLP
By

Sarah A. Zylstra, State Bar No. 1033159
Andrew N. DeClercq, State Bar No. 1070624
Attorneys for Defendants Madison Metropolitan School District Board of Education and Madison Metropolitan School District
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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

DAVID BLASKA,

Plaintiff,

v.

Case No.: 14-cv-2578
Case Code: 30701
Declaratory Judgment

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

Defendants.

AFFIDAVIT OF SARAH A. ZYLSTRA

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Sarah A. Zylstra, being duly sworn, on oath deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin. My office is located at One S. Pinckney Street, Suite 410, Madison, Wisconsin 53703. I am one of the attorneys for defendants Madison Metropolitan School District Board of Education and Madison Metropolitan School District (collectively "MMSD"). I make this affidavit in support of MMSD's motion to determine the sufficiency of the answers and objections to MMSD's requests to admit and deem them admitted or, in the alternative, to compel.

2. Attached as Exhibit A is a true and correct copy of MMSD's Second Set of Discovery to Plaintiff that was served on plaintiff on May 4, 2015.

3. Attached as Exhibit B is a true and correct copy of Plaintiff's Responses to Requests to Admit and Interrogatories, dated June 1, 2015.

4. Attached as Exhibit C is a true and correct copy of a letter I sent to Attorney McGrath dated June 9, 2015.

5. Attached as Exhibit D is a true and correct copy of a letter I received from Attorney McGrath dated June 12, 2015.

Sarah A. Zylstra

Subscribed and sworn to before me
this 22nd day of June, 2015.

Notary Public, State of Wisconsin
My Commission expires 12-13-15

MARLENE M. SPENCER NOTARY PUBLIC STATE OF WISCONSIN

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

DAVID BLASKA,

Plaintiff,

v.

Case No.: 14-cv-2578
Case Code: 30701
Declaratory Judgment

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

Defendants.

DEFENDANT MMSD'S SECOND SET OF DISCOVERY TO PLAINTIFF

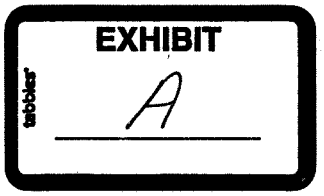
TO: Plaintiff David Blaska
c/o Richard M. Esenberg
Wisconsin Institute for Law & Liberty
1139 E. Knapp St.
Milwaukee, WI 53202

Pursuant to Wis. Stat. §§ 804.08 and 804.09, Defendants Madison Metropolitan School District and Madison Metropolitan School District Board of Education (collectively "the District"), by their attorneys, requests that the Plaintiff answer the following discovery under oath within 30 days from the date of service.

INSTRUCTIONS

1. When answering this discovery, please provide the text of each request or interrogatory immediately before the answer.

2. In answering this discovery, you are required to furnish all of the information not privileged known by or available to you or subject to your reasonable inquiry, including information in the possession of your attorneys, accountants, advisors or any other person



directly or indirectly employed by or connected with you, and anyone else otherwise subject to your control.

3. In answering this discovery, you must make a diligent search of your records and of all of the other papers and materials in your possession or available to you or to your representatives.

4. Answer each interrogatory or request separately and fully in writing under oath, unless you object to it. In that event, state the reasons for the objection in lieu of an answer. If you object to an interrogatory or request as calling for information beyond the scope of discovery, you nevertheless must answer the interrogatory or request to the extent that it is not objectionable. If any interrogatory or any portion of an interrogatory or request is objected to on the ground that it requests information that is privileged or falls within the work-product doctrine, provide the following information, except as it may call for the precise information you object to disclosing:

(a) state the nature of the privilege or doctrine you claim protects the information requested;

(b) if a document is involved:

(i) identify it;

(ii) state the type of document (e.g., letter, memorandum, report);

(iii) state its present location and the name of the custodian;

(iv) provide a brief summary of its contents;

(v) state the name and address of the person(s) who drafted, prepared and signed it; and

(vi) identify all persons known to you who have seen the document.

(c) if an oral communication is involved:

(i) identify it; and

(ii) identify all persons known to you to whom the substance of the oral communication has been disclosed; and

(d) state any other facts you rely on to establish that the privilege has been properly claimed.

5. If you cannot answer any interrogatory or request in full, answer to the fullest extent possible, specify the reason for your inability to answer the rest of the question, and state whatever information or knowledge you have concerning the unanswered portion.

6. You are under a continuing duty under Wis. Stat. § 804.01(5) to supplement your answer to any interrogatory requesting the identity of any persons having knowledge of discoverable matters and the identity and location of each person to be called as an expert witness at trial.

7. The answers to these interrogatories must be signed under oath by the person making them, and any objections must be signed by the attorney making them.

DEFINITIONS

8. "You," "your," and "yourself" mean and include David Blaska and any person who has acted for or on David Blaska's behalf.

9. "MMSD" means Defendant Madison Metropolitan School District, as well as its employees, agents, and all persons acting or purporting to act on its behalf.

10. "Board" means Defendant Madison Metropolitan School District Board of Education, as well as its employees, agents, and all persons acting or purporting to act on its behalf.

11. "MTI" means Defendant Madison Teachers Inc., as well as its employees, agents, and all persons acting or purporting to act on its behalf.

12. "WILL" means the Wisconsin Institute for Law & Liberty, as well as its employees, agents, and all persons acting or purporting to act on its behalf.

13. "Your Claims" or "your Claims" refer to the claims set forth in the Complaint filed by Plaintiff in the above-caption lawsuit.

14. "Act 10" means collectively 2011 Act 10 and 2011 Act 32.

14. "Document" is used comprehensively and includes, but is not limited to, all printed materials, writings, tape recordings, physical exemplars, any and all computer records, including data disks, and other tangible forms of communication of whatsoever nature, and photographs or videos which record, refer to, relate to, set forth or describe any act, transaction, occurrence, event, or omission relating in any way to the matters or things about which inquiry is made by this discovery, including copies, in possession and/or control of the plaintiff or his agents known to exist. If a document has been prepared in several copies, or additional copies have been made, and any copy is not identical to the original (or by reason of subsequent modifications of the copy by addition of notations, or other modifications or alteration, is no longer identical), each non-identical copy is a separate document. The term "document" also includes any email, text messages, information, data or other matter stored on a computer or electronically. If such information, data or other matter does not presently exist in printed form, a request for documents containing such information, data or other matter should be deemed, unless otherwise specified, a request that such information, data or other matter be printed and then produced in printed form or printed in electronic form. The term "document" includes any electronic messages such as e-mail that are retrievable whether or not they have been deleted by the recipient and/or sender of the message.

15. "Identify" when used in reference to a person it means to state:

(i) that person's full name;

(ii) last known residence and telephone number of residence; business address and business telephone number;

(iii) company affiliation at the date of the transaction referred to; and

(iv) title and duties in the company with which he or she was so affiliated.

"Identify" or "identity" when used in reference to a document means to state:

(a) The type of document (e.g., letter, memorandum, print-out, report, newspapers, etc.);

(b) The date, if any, of the document;

(c) The author;

(d) The present location;

(e) The person or persons having custody or control over it; and

(f) The person or persons executing this document, if applicable.

If any such document was, but is no longer, in your possession, custody or control, state what disposition was made of it.

REQUESTS TO ADMIT

REQUEST NO. 1: Admit that the Wisconsin Institute for Law & Liberty ("WILL"), which represents you in this lawsuit, is a 501(c)(3) nonprofit organization.

REQUEST NO. 2: Admit that WILL does not pay taxes in the Madison Metropolitan School District.

REQUEST NO. 3: Admit that at the time WILL sent the letters, copies of which were attached to your complaint (i.e., the October 3, 2013 letter to Jennifer Cheatham and the May 15, 2014 letter to the School Board Members of the Madison Metropolitan School District), you had not retained WILL to represent you.

REQUEST NO. 4: Admit that the following statement appears on WILL's website: "WILL is a nonprofit organization. We provide all of our services – litigation, legal advice, and education – at no cost to our clients."

REQUEST NO. 5: Admit that WILL is bearing all of the expense of this lawsuit for you as the plaintiff, including the cost of having attorneys represent you.

INTERROGATORIES

INTERROGATORY NO. 5: For any of the above Requests to Admit for which your answer was anything other than unqualified admission, please provide a detailed explanation of the basis for your denial, partial denial, or qualification.

Dated this 4th day of May, 2015.

BOARDMAN & CLARK LLP
By

Sarah A. Zylstra, State Bar No. 1033159
Andrew N. DeClercq, State Bar No. 1070624
Attorneys for Defendants Madison Metropolitan School District Board of Education and Madison Metropolitan School District
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adeclercq@boardmanclark.com

STATE OF WISCONSIN CIRCUIT COURT 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.

PLAINTIFF'S RESPONSES TO REQUESTS TO ADMIT AND INTERROGATORIES FROM THE DEFENDANTS MADISON METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION AND MADISON METROPOLITAN SCHOOL DISTRICT

The Plaintiff, David Blaska, responds to the Requests to Admit and Interrogatories from the Defendants, Madison Metropolitan School District Board of Education, and Madison Metropolitan School District as follows:.

REQUESTS TO ADMIT

REQUEST NO. 1: Admit that the Wisconsin Institute for Law & Liberty ("WILL"), which represents you in this lawsuit, is a 501 (c)(3) nonprofit organization.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. § 804.01. Subject to this objection and without waiving it, the Plaintiff does not know the tax status of WILL.

REQUEST NO. 2: Admit that WILL does not pay taxes in the Madison Metropolitan School District.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. § 804.01. Subject to this objection and without waiving it, the Plaintiff does not know whether WILL pays taxes in the Madison Metropolitan School District.

REQUEST NO. 3: Admit that at the time WILL sent the letters, copies of which were attached to your complaint (i.e., the October 3, 2013 letter to Jennifer Cheatham and the May 15, 2014 letter to the School Board Members of the Madison Metropolitan School District), you had not retained WILL to represent you.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. § 804.01 and seeks information protected by the Attorney-Client privilege.

REQUEST NO. 4: Admit that the following statement appears on WILL's website: "WILL is a nonprofit organization. We provide all of our services — litigation, legal advice, and education — at no cost to our clients."

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. § 804.01. Subject to this objection and without waiving it, the Plaintiff does not know if that statement is on WILL's website because the Plaintiff has not recently reviewed WILL's website.

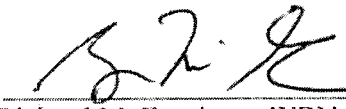
REQUEST NO. 5: Admit that WILL is bearing all of the expense of this lawsuit for you as the plaintiff, including the cost of having attorneys represent you.

RESPONSE: Objection. This request exceeds the scope of discovery set forth in Wis. Stat. § 804.01. Further, the terms of the engagement between Plaintiff and his counsel is protected by the Attorney-Client privilege.

INTERROGATORIES

INTERROGATORY NO. 5: For any of the above Requests to Admit for which your answer was anything other than unqualified admission, please provide a detailed explanation of the basis for your denial, partial denial, or qualification.

RESPONSE: The Requests to Admit do not seek discovery on matters which are relevant to the subject matter involved in the pending action and are not reasonably calculated to lead to the discovery of admissible evidence. The requests have nothing to do with whether or not the CBAs in issue are illegal and void. Nor are the requests to admit relevant to the defense raised under Section 893.80. As set forth in the Plaintiff's brief in opposition to the motion for summary judgment filed by the Board and the District, the issues relating to the defense under Section 893.80 are whether: (1) that statute applies to the Plaintiff's claims for an injunction and for a declaratory judgment; (2) whether the notices received by the Board and the District substantially complied with Section 893.80, and (3) whether the Board and the District had actual notice. The requests to admit are not reasonably calculated to lead to admissible evidence on any of those issues. The first issue is a legal issue and the second and third issue do not turn in any way, for example, on whether WILL is a 501(c) (3) organization, or where WILL pays taxes or what is on WILL's website.

As to Objections:  Date: 6/1/15

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June 9, 2015

Via Email Only
Attorney Brian McGrath
Wisconsin Institute for Law & Liberty, Inc.
1139 East Knapp Street
Milwaukee, Wisconsin 53202

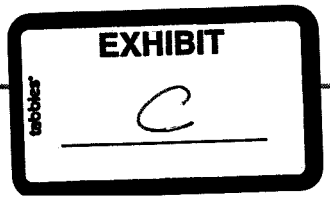
RE: David Blaska v. Madison Metropolitan School District Board of Education, et al.
Case No.: 14-CV-2578

Dear Mr. McGrath:

I write to meet and confer regarding your responses to MMSD's requests to admit and interrogatories. Your objections and non-answers are not well founded and I ask you to amend and supplement your responses.

With regarding to request to admit nos. 1, 2 and 4, you have objected and then, subject to the objection, have indicated that plaintiff does not know the information in the request to admit. That is not a proper response. As Wis. Stat. § 804.11 provides, an answering party may not give lack of information as a reason for failing to admit or deny a request for admission unless the person has made reasonable inquiry and the information is not known or readily obtainable by the party. As those requests to admit relate to his own counsel, he cannot avoid answering those requests to admit.

With regard to request nos. 3 and 5, you have objected and refused to answer on attorney-client privilege grounds. Your objection is not well founded. With regard to request no. 3, the request relates to the letters that WILL sent to the district. You have put those letters at issue by attaching them to the complaint and have argued strenuously in your summary judgment materials that those letters provided notice to the district for the plaintiff's claim. I do not believe the information sought in the requests is privileged anyway, but even if it were, you have put the letters at issue and, therefore, cannot use attorney-client privilege as a sword and a shield. *See, e.g., State v. Hydrite Chemical Co.*, 220 Wis. 2d 51, 68-69, 582 N.W.2d 411 (Wis. 1998) (party impliedly waives the attorney-client privilege when he places a claim or defense at issue, and the document or information in question has a direct bearing on that claim or defense). Having put the circumstances of those letters at issue, you have waived the privilege as to that matter.



With regard to request no. 5, whether WILL is bearing all the expense of the lawsuit or not does not involve the rendering of legal advice and is not a communication protected by the privilege. Wis. Stat. §§ 905.03, 905.11.

Accordingly, I am requesting that you amend your responses. Given the timing of briefing, I request that you amend your responses by the close of business Friday, June 12, 2015. Thank you.

Very truly yours,

BOARDMAN & CLARK LLP

Sarah A. Zylstra

SAZ/ms
cc: Attorney Lester Pines (*via email only*)
Attorney Tamara Packard (*via email only*)

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June 12, 2015

Sarah Zylstra Via Email szylstra@boardmanclark.com
Boardman & Clark, LLP
1 South Pinckney Street, Suite 410
Madison, WI 53701

Re: Blaska v. Madison Metropolitan School District, et al
Case No. 14-CV-2578

Dear Ms. Zylstra:

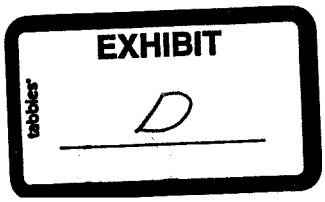
This will respond to your letter dated June 9, 2015 regarding the Plaintiff's responses to your clients' second set of discovery requests. I would be happy to discuss our responses with you but I also thought it would be useful to set forth our position in writing.

I will respond on a point by point basis. You first say you believe that the responses to Request to Admit Nos. 1, 2 and 4 are insufficient because even though Mr. Blaska does not know the information you asked him to admit, you believe he had a duty to find out the information. We disagree for two reasons.

First, your letter does not deal with our objections to these requests to admit. As stated in our written responses we objected to each of these requests to admit on the grounds that the requests exceed the scope of discovery set forth in Wis. Stat. § 804.01. If our objections are proper, and we believe they are, then the issue you raise in your letter is a moot point. Thus, the first question is whether these requests exceed the scope of discovery.

The requests ask Mr. Blaska to admit whether WILL is a 501(c)(3) organization, whether WILL pays taxes in Madison and whether a particular statement is made on WILL's website. The question I would ask you is what these matters have to do with anything in this case? They certainly have nothing to do with whether or not the CBAs in issue are illegal and void. Nor do I believe you can argue that they are relevant to, or reasonably calculated to lead to admissible evidence related to, the defenses raised under Section 893.80 or based on Mr. Blaska's standing.

As set forth in the Plaintiff's brief in opposition to the motion for summary judgment filed by the Board and the District, the issues relating to the defense under Section 893.80 are whether: (1) that statute applies to the Plaintiff's claims for an injunction and for a declaratory judgment; (2) whether the notices received by the Board and the District substantially complied with Section 893.80, and (3) whether the Board and the District had actual notice. The requests to admit are



not reasonably calculated to lead to admissible evidence on any of those issues. In fact, these are all legal issues, which is why they are capable of being resolved on summary judgment. I assume you would not have moved for summary judgment under Section 893.80 if it is your position that there are material issues of fact in dispute. The argument that there are issues of fact on this point would be directly inconsistent with your motion. Certainly these legal issues do not turn in any way on whether WILL is a 501(c)(3) organization, or where WILL pays taxes, or what is on WILL's website. The same is true for Mr. Blaska's standing. Questions about WILL are completely unrelated to that defense.

Second, even if the Court were to overrule our objections, Mr. Blaska does not know the information that you ask about. I do understand that Section 804.11 says that a party has to make reasonable inquiry on matters subject to requests to admit, but that does not mean that Mr. Blaska has to go out and look up things that you ask him to look up. It means that he needs to check his own information before he can respond that he does not know. If you were asking him information about himself and his personal circumstances, he would have to conduct a reasonable inquiry before answering. He is not required to conduct an investigation, even a minor one, on your behalf.

Your second and third arguments are related. You assert that the attorney-client privilege objections to Request Nos. 3 and 5 are not well founded. Those requests ask Mr. Blaska to admit information as to whether he was represented by counsel at a particular time and the terms of his representation. Again, your letter ignores our objection that the requests exceed the scope of discovery set forth in Wis. Stat. § 804.01. Just as with Requests to Admit 1, 2 and 4, if our objections to Requests 3 and 5 based upon the scope of discovery are proper, and we believe they are, then the privilege issue you raise in your letter is a moot point. Thus, again, the first question is whether these requests exceed the scope of discovery.

Just like the other requests, they certainly have nothing to do with whether or not the CBAs in issue are illegal and void. In your letter, you argue that we have put the letters written to the Board and the District in October, 2013 and May, 2014 in issue as they relate to your clients' defense under Section 893.80 but that does not answer the question as to how Requests to Admit Nos. 3 and 5 are within the scope of discovery. There is no dispute that the letters were received by the Board and the District. There is also no dispute about what the letters say. The letters, on their face, either constitute substantial compliance with Section 893.80 and/or actual notice, or they do not. What difference do the terms of our representation of Mr. Blaska make with respect to those questions? Assume he is paying all of our fees – how would that change the legal analysis of the letters. Assume he is paying none of our fees – would that get a different result? The answer is that it does not matter either way.

Assume we have represented Mr. Blaska for years – how would that change the legal analysis regarding the letters? Assume that we did not represent Mr. Blaska in October. 2013 or May, 2014 – how would that change the legal analysis of the letters? Again, it does not matter either way. The Court will interpret the letters on their face and decide the legal issues based upon the content of the letters. They either constitute substantial compliance and/or actual notice or they do not. The subject matter of the requests to admit does not change the analysis either way.

We also disagree with your argument regarding privilege. First, information relating to the representation of a client is *confidential* information. SCR 20:1.6. It is also privileged under Section 905.03 ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential* communications made for the purpose of facilitating the rendition of professional legal services to the client.") Your requests inappropriately inquire into the attorney-client relationship between Mr. Blaska and his counsel. The requests are properly objectionable because they exceed the scope of discovery and/or because of the attorney client privilege.

Let me know if you would like to discuss any of the above or if you think some compromise might be made that satisfies the concerns of both sides.

Very truly yours

BRIAN McGRATH
brian@will-law.org
414-727-7412 Direct

cc: Lester Pines (via email) pines@cwpb.com
Tamara Packard (via email) Packard@cwpb.com

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

DAVID BLASKA,

Plaintiff,

v.

Case No.: 14-cv-2578
Case Code: 30701
Declaratory Judgment

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

Defendants.

REPLY IN SUPPORT OF MMSD'S MOTION FOR SUMMARY JUDGMENT

Blaska has failed to introduce evidence to create a genuine issue of material fact that would make summary judgment in favor of MMSD improper. Blaska's claims are inconsistent with binding Wisconsin precedent which requires that the CBAs, negotiated and executed in compliance with the law, be given their effect. Blaska also failed to comply with the notice of claim requirements of Wis. Stat. §§118.26 and 893.80 and failed to meet his burden of establishing that he has standing to pursue his claims. Summary judgment for defendants is therefore warranted.

Reply Regarding Proposed Undisputed Facts

Blaska asserts that a number of MMSD's Proposed Undisputed Facts ("PUFs") are disputed, but they are not because he has not put forward any evidence to support his disputes. As the Seventh Circuit has pithily observed in regard to summary judgment: "Roughly speaking, this is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Schacht v. Wis. Dept. of*

Corrections, 175 F.3d 497, 504 (7th Cir. 1999); *see also Kenefick v. Hitchcock*, 187 Wis. 2d 218, 227-28, 522 N.W.2d 261 (Ct. App. 1994) (plaintiffs' failure to make showing sufficient to establish existence of essential element warranted summary judgment; summary judgment is not disfavored procedural shortcut, but integral part of procedural rules). Blaska's failure to submit the requisite evidence warrants summary judgment and dismissal of Blaska's claims with prejudice. MMSD replies to Blaska's specific asserted "disputes" as follows:

1. PUF ¶7: Improper dispute. No evidentiary support for a dispute. In response to MMSD's PUF ¶7, Blaska does not cite any evidentiary basis for a dispute but rather states only as follows: "Disputed. Not an evidentiary fact, but instead a disputed inference." But PUF ¶7 pertains to a factual issue—the provisions of Act 10 that underlie Blaska's claims in this complaint and whether those provisions were included in Judge Colás's Order invalidating portions of Act 10. MMSD provided an evidentiary basis for this proposed fact, and because Blaska has provided no contrary evidence, this fact has been established for purposes of MMSD's motion for summary judgment.

2. PUF ¶12: Inadequate dispute. Blaska's cited factual evidence does not raise a dispute. In response to PUF ¶12, which pertains to MMSD and MTI's reliance on Judge Colás's order and the WERC Emergency Rules in their collective bargaining for the CBAs, Blaska cites a number of other Act 10 cases and a letter that one of his attorneys wrote (not on his behalf, but on behalf of WILL). These do not provide an evidentiary basis to dispute MMSD's proposed fact. In support of its PUF, MMSD submitted affidavits from Jennifer Cheatham ("Cheatham"), the District's Superintendent, and John Matthews ("Matthews"), MTI's Executive Director. Both provided testimony regarding what they and their organizations relied on in bargaining. Blaska has provided no evidence to dispute this testimony. The fact that there were other Act 10

cases or that WILL sent a letter to MMSD provides no evidence of what MMSD and MTI relied on in bargaining and does not undermine or contradict the testimony of Cheatham and Matthews. Therefore, PUF ¶12 has not properly been disputed.

3. PUF ¶¶17, 18 and 19: Inadequate dispute. PUF ¶17 pertains to Blaska's failure to file a notice of claim prior to filing his lawsuit. Rather than supporting his dispute of this PUF with his own testimony that he did, in fact, file a notice of claim or otherwise communicate his intent to file a lawsuit to MMSD prior to filing his complaint (which he did not do), Blaska cites two letters that someone else sent to MMSD. Not only do they not come close to meeting the applicable notice of claim requirements, they are not even communications from or on behalf of Blaska. In contrast, MMSD supported this PUF with the affidavits of Cheatham and Barbara Lehman, the Secretary of the Board, establishing that prior to Blaska's filing of this lawsuit, MMSD had not received any suggestion from Blaska that he intended to pursue any sort of relief from MMSD, much less an actual notice of claim. Therefore, PUF ¶17 is not properly disputed. For the same reasons, there is an inadequate dispute as to PUF ¶¶18 and 19.

4. PUF ¶¶20 and 21: Inadequate dispute. PUF ¶20 pertains to the prejudice that MMSD suffered as a result of Blaska's failure to provide a notice of claim. In support of this PUF, Cheatham testified to MMSD's inability to explore settlement or budget for litigation prior to Blaska's filing of this lawsuit and the expense of this litigation. In response, Blaska cites the same evidence he cited in response to PUF ¶17. But the fact that WILL sent letters to MMSD does not undermine or contradict Cheatham's testimony. PUF ¶20 is therefore not properly disputed. For the same reason, there is an inadequate dispute as to PUF ¶21.

5. PUF ¶23: Improper dispute. PUF ¶23 pertains to MMSD's authority to pay its employees and provide them with fringe benefits and its intent to do so. It is supported by

testimony from Cheatham. In disputing this PUF, Blaska does not cite any evidence, but rather asserts that this is "[n]ot an evidentiary fact, but instead a disputed inference." Leaving aside that Blaska has already conceded PUF ¶23 in his response to MTI's motion for summary judgment by agreeing that MMSD has unilateral authority to establish terms and conditions of employment (*see* Blaska MTI Resp., at 4 & n.1), this PUF does, in fact, raise a factual proposition that can only be properly disputed with contrary factual evidence. Blaska cites none. As such, PUF ¶23 is not disputed.

6. PUF ¶¶26 and 27: Improper dispute. Blaska attempts to dispute PUF ¶26 with the same "disputed inference" approach that he took in responding to PUF ¶23. But this approach fails here as well. PUF ¶26 pertains to the purely factual issue of the payroll system that MMSD uses and the costs of using that payroll system. It is supported by the testimony of Jennifer Trendel ("Trendel"), MMSD's Payroll Supervisor. Blaska cites no facts to contradict Trendel's testimony on these points. As such, PUF ¶26 is not disputed. For the same reason, there is an improper dispute to PUF ¶27.

Reply to Additional Proposed Undisputed Facts

There is no dispute as to Blaska's additional proposed facts 30 through 33.

34. No dispute with clarification. In *Lacroix v. Kenosha Unified School District*, no one cited or briefed Wis. Stat. §118.26 and Judge Bastianelli did not consider it in his decision. Second Packard Aff. ¶2. Here, in contrast, MMSD has argued Wis. Stat. §118.26 requires the application of Wis. Stat. §893.80(1d) in this case (MMSD Br. at 3-4, 17-18, 22), and Blaska has ignored §118.26 in his response, effectively conceding this point. Further, as a circuit court decision, Judge Bastianelli's decision is not precedent. Moreover, the persuasive value of the decision is tempered by the fact that plaintiff settled her claims against the district in *Lacroix v.*

Kenosha Unified School District and consequently the district in that case did not have the opportunity to address this issue on summary judgment or appeal. Second Packard Aff. ¶3.

35. Disputed. First, this is a legal, not a factual, proposition, and therefore not a proper proposed undisputed fact. Second, the cited order is a per curiam order that has no precedential value, and its citation here is improper. *See* Wis. Stat. §809.23(3)(a). Third, the cited order does not support the proposed fact, because the Wisconsin Supreme Court did not hold that Judge Colás's Order in *MTI v. Walker* did not apply to non-parties. Judge Colás's original Order granted a declaratory judgment but not any injunctive relief. A year after the Order, Judge Colás issued a contempt order against the two WERC Commissioners who were defendants in *MTI v. Walker*. McGrath Aff., Ex. 6, ¶2. The supreme court decision Blaska cites in PUF ¶35 addressed whether this contempt order was properly issued when the appeal of the original Order in *MTI v. Walker* was pending before the supreme court. The supreme court determined that it was not because it expanded Judge Colás's original order (which had granted only a declaratory judgment) by granting a new type of relief (an injunction). *Id.* ¶20. The decision did not discuss whether Judge Colás's declaratory judgment from the original Order in *MTI v. Walker* applied to non-parties, much less hold that it did not. Rather, the decision focused on the expansion of relief from the original Order. *Id.* ¶20 & n.5.

36. Disputed in part, undisputed in part. Blaska cites only the 2014-2015 CBA for teachers, which is not sufficient to support this proposed fact regarding "the CBAs." Nevertheless, for purposes of this motion, MMSD admits that the CBAs provide that: MTI is the exclusive collective bargaining agent for a variety of employees; MMSD and MTI agree to meet for the purposes of negotiating in good faith on questions of wages, hours, and conditions of employment; MTI has the right to participate in all grievances; MMSD will automatically deduct

dues from employees and forward them to MTI; and MMSD will deduct fair-share amounts from the paychecks of employees who do not voluntarily become members of MTI or who have not authorized dues deductions and remit those amounts to MTI. Blaska has not cited any evidence except the CBAs, the terms of which speak for themselves. MMSD disputes any implication that the CBAs contain terms that violate Act 10, as that is a legal issue and one of the key disputes in this lawsuit. MMSD also disputes Blaska's proposition that fair-share deductions are made "against the wishes of the employee," as Blaska has provided no evidentiary support for this assertion, and this assertion is contradicted by the fact that members of MTI ratified the CBAs. *See* PUF ¶¶13-14. Finally, to the extent implied, MMSD disputes that there is an increased cost to tax payers associated with these items as Blaska has offered no such proof and MMSD has offered evidence that administering the CBAs does not result in any illegal expenditure of public funds. *See* PUF ¶¶23-27.

37. Disputed in part, undisputed in part. Undisputed that the CBAs include salary provisions. Disputed that those provisions as "extensive and elaborate." The terms of the CBAs speak for themselves. *See* McGrath Aff., Ex. 2.

38. Disputed in part, undisputed in part. Blaska cites only the 2014-2015 CBA for teachers, which is not sufficient to support this proposed fact regarding "the CBAs." However, for purposes of this motion, MMSD admits that the CBAs reflect the terms and conditions of employment for the District's employees, which include salaries and the items listed in this PUF. To the extent implied, MMSD disputes that taxpayers would not have to pay these costs absent the CBAs. Nothing in Act 10 prohibits the District from paying these costs now. Absent the CBAs, MMSD would have unilateral authority to pay the costs that are the subject of this PUF, a point that Blaska apparently concedes. *See* PUF ¶23; Blaska Resp. at 4 & n.1.

Argument

Blaska asserts that MMSD has "concede[d] that the CBAs violate Act 10 in numerous ways." Pl. Resp. at 7. Not so. Nothing MMSD or MTI did in negotiating and executing the CBAs violated Act 10 because Act 10 was not in effect for MMSD and MTI when the CBAs were negotiated and executed. Further, even after Act 10 became effective for MMSD and MTI, Wisconsin law, including Act 10 itself, requires that the CBAs be given their effect until their expiration. None of the arguments raised in Blaska's response compel a different result.

Many of Blaska's arguments were addressed in MMSD's response to Blaska's summary judgment motion and MMSD incorporates that brief by reference.

I. MMSD properly relied on Judge Colás's Order.

Blaska first argues that the Order has no precedential effect. But this argument misses the point. MMSD is not relying on the ***precedential*** effect of the Order but rather the fact that the Order was valid and binding on MMSD and MTI at the time the CBAs were executed and, therefore, under Wisconsin law, the CBAs are entitled to the protection of the Order even after its reversal. MMSD Resp., at 9-10. There is a distinction between continued reliance on precedent that has been overturned (which is improper) and the continuation of obligations entered into in reliance on a valid and binding final order of a circuit court even after that order has been reversed (which is proper). Blaska's argument fails because it misses this distinction.

Blaska further contends that MMSD, as a non-party, has no basis to rely on the Order. Wisconsin law holds to the contrary. *See* MMSD Resp., at 8-9 (discussing *Slabosheske*). Blaska next erroneously contends that the Wisconsin Supreme Court specifically held that MMSD cannot rely on the Order. Blaska's citation of this per curium order is not only improper, but his interpretation of the court's holding is wrong. *See* Resp. to PUF ¶35, above.

Nor would such a holding make any sense. As Blaska concedes, MTI was entitled to the benefit of the Order against the defendants in that case, including the WERC Commissioners. *See* Pl. Resp., at 10. Therefore, had the District ignored the Order and refused to bargain with MTI, MTI would have been able to bring a prohibited practice complaint to the WERC, and the WERC would have been bound by the Order to find for MTI and against MMSD. *See generally* Wis. Stat. §111.70(3) and (4)(a). As such, the District's only choice absent exposing itself to costly litigation with MTI was to rely on and follow the Order and bargain with MTI.

Further, while *Slabosheske* supports this approach, Blaska has offered no authority that would have permitted the District to unilaterally determine that, contrary to Judge Colás's Order, Act 10 did, in fact, govern the bargaining relationship between it and MTI. It is the courts' role to make that determination, and it would have been improper for the District to usurp that role. *See Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976) (fact that an order or judgment is erroneously or improvidently rendered does not justify failing to abide by its terms).

The District was not at liberty to ignore Judge Colás's Order. Had it done so, it would have exposed itself to a prohibited practice complaint. Blaska's proposed reading of the law, therefore, would have put the District in catch-22: rely on the Order and face liability for violating Act 10 or ignore the Order and face liability for improperly flouting a final and binding ruling of a circuit court. The rule of *Slabosheske* exists specifically to avoid such a catch-22.

And Blaska's attempts to distinguish *Slabosheske* fail. Blaska first misconstrues MMSD's position. He contends that MMSD is asserting that "actions rendered unlawful" by the supreme court's reversal of the Order may "continue following voiding" of the Order. Pl. Resp., at 11. Similarly, he contends that MMSD is arguing that everyone in the state was bound by

Judge Colás's Order. Pl. Resp., at 12 n.3. But MMSD is not asserting that it may now engage in acts prohibited by Act 10 or that everyone was bound by Judge Colás's Order.

Rather, MMSD and MTI are asserting that under the plain language of *Slabosheske*, because the CBAs were validly entered into, they are now entitled to their effect. MMSD and MTI have not engaged in any collective bargaining since the supreme court's order, nor are they claiming that they are now entitled to bargain terms not allowed under Act 10. The fact that the CBAs include terms that Act 10 would have prohibited had it been effective when the CBAs were executed does not render the CBAs invalid or unenforceable. *See* MMSD Resp., at 15-16.

Blaska next makes a confused argument that the rule of *Slabosheske* may be invoked only "on a party to a case where the party wanted to avoid the effect of the judgment." Pl. Resp., at 12. But *Slabosheske* makes no such limitation. *Slabosheske* held that "for the protection of those acting in reliance upon it," the final judgment of a circuit court "must be considered effective until reversed." 273 Wis. at 152.

Blaska finally argues that the District and MTI did not rely in good faith on Judge Colás's Order but offers no such evidence. *See* Reply to PUF ¶12. Moreover, even if this were not a factual issue but rather a "disputed inference" as Blaska claims, the circumstances fully support the inference that MTI and the District relied in good faith on Judge Colás's Order. The law in Wisconsin is that a final order of a circuit court — even if mistaken — is valid until reversed. It was the role of the courts, not MTI or the District, to determine whether the Order was correct. The courts allowed the Order to remain in effect throughout the pendency of the appeal, despite repeated requests for the Order to be stayed.[1] PUF ¶9.

[1] Blaska also claims that a letter sent to MMSD by WILL telling MMSD that it had to "comply with the law" is an indication that MMSD did not act in good faith. Pl. Resp., at 14. But, again, the law that applied to MMSD and MTI at the time of that letter was the law as defined by Judge Colás's Order. Moreover, Blaska's claim that this letter provided "specific notice that litigation would result" if MMSD did not ignore the Order is an overstatement.

II. There is no continuing violation of Act 10.

Blaska asserts that by continuing to operate under the CBAs, MMSD and MTI are engaging in a continuing violation of Act 10. Pl. Resp., at 16-17. To illustrate this point, Blaska explains: "Just as Mr. Slabosheske could not have continued to lend money to District No. 7 after the trial court decision was reversed and expect to be repaid, the Defendants herein cannot continue to enjoy the fruits of an unlawful contract." *Id.* at 16. Blaska has the first half of this analogy right, but the second half does not follow. Slabosheske had a right to enforcement of the existing lending contract but could not make a new loan. MMSD does not dispute that ***after*** the circuit court's ruling was reversed it would be improper to rely on that ruling to enter into a ***new*** agreement. But this is not what the District and MTI did. Rather, ***just as Slabosheske and District No. 7 reached a loan agreement before the circuit court was reversed, and just as Slabosheske continued to enforce District No. 7's debt and collect payments after the reversal,*** the District and MTI entered into the CBAs ***before*** Judge Colás's Order was reversed, and they are now continuing to execute their obligations under those agreements. Contrary to Blaska's assertion (and this is where his analogy breaks down), the District and MTI did not enter into ***new*** CBAs after the Order was reversed.

III. Blaska's claims are barred by Wis. Stat. §893.80.

A. Section 893.80 applies to Blaska's claims.

Blaska first argues that §893.80 does not apply. But as discussed in MMSD's summary judgment brief, Wis. Stat. §118.26 expressly provides to the contrary. MMSD Br., at 3-4, 17-18, 22. Blaska has not addressed §118.26 at all, and has thus conceded this argument. Blaska's

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The letter was sent by a nonprofit organization based in Milwaukee that had no standing to bring a suit against MMSD challenging the CBAs, and the letter identified no potential plaintiff for such a lawsuit. Further, even if the threat of a lawsuit were real, MMSD faced a more credible threat of litigation if it refused to bargain with MTI. WILL's letter, therefore, does not support an inference that MMSD somehow acted in bad faith by taking action in reliance on the law that applied to it and MTI at the time.

argument that §893.80 does not apply in actions seeking only declaratory relief has also been rejected by the Wisconsin Supreme Court. *E-Z Roll Off, LLC*, 2011 WI 71, ¶28 ("[D]eclaratory relief is not, by its nature, in conflict with providing governmental entities a 120-day period to review a claim."). And, in regard to injunctive relief, the supreme court has recognized that the default rule is that the notice of claim requirements apply, as they are applicable to "***all causes of action***, not just those in tort and ***not just those for money damages***."[2] *DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994) (emphasis added). While it is true that the courts have recognized some ***limited*** exceptions to this general rule, none apply here. For an exception to apply, courts examine three factors, all of which must be met:

> (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of §893.80(1), Stats., would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which §893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

Oak Creek Citizen's Action Comm. v. City of Oak Creek, 2007 WI App 196, ¶7, 304 Wis. 2d 702, 738 N.W.2d 168 (quoting *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶9, 265 Wis. 2d 422, 665 N.W.2d 379). Blaska's injunctive relief claim meets none of these factors.

First, courts look to whether the claim is brought under a "specific statutory scheme," meaning one imposing specific procedures and time limits for actions against municipal entities. *See, e.g., Oak Creek*, 2007 WI App 196, ¶8 (statute at issue imposed "tight time limits"); *Nesbitt Farms*, 2003 WI App 122, ¶10 (statute outlined a specific "procedure and deadline"); *Town of*

[2] Blaska cites *Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 530 N.W.2d 399 (Ct. App. 1995) to argue that §893.80 does not apply to actions seeking declaratory or injunctive relief because it applies only where "the government is exposed to liability." *See* Pl. Resp., at 18. This argument has no merit. First, the proposition is directly contradicted by the supreme court's ruling that §893.80 applies to "all causes of action," a rule which the court of appeals has continued to apply even after *Kettner*. *See, e.g., Oak Creek*, 2007 WI App 196, ¶6. Second, *Kettner* was not addressing the applicability of §893.80 to claims for injunctive or declaratory relief, but rather whether an independent contractor could use §893.80 as a shield against liability in tort. *See* 191 Wis. 2d at 736-37. Finally, both declaratory and injunctive relief are forms of "liability," a term which encompasses more than just damages. *See generally* Black's Law Dictionary 932 (8th ed. 2004) (defining "liability" as "[t]he quality or state of being legally obligated or accountable").

Burke v. City of Madison, 225 Wis. 2d 615, 625-26, 593 N.W.2d 822 (Ct. App. 1999) (statute imposed mandatory deadlines).[3] Blaska does not cite to anywhere in Act 10 that has procedures or deadlines for bringing actions against municipalities. *See* Wis. Stat. §111.70(2), (4)(mb).

Blaska also fails to any legislative preference for prompt resolution of claims under Act 10. While he argues that the temporary injunction and the declaratory judgment statutes demonstrate the requisite legislative preference for a prompt resolution, this is not the proper analysis. Rather, courts look to the underlying statute at issue. *See, e.g.*, *Oak Creek*, 2007 WI App 196, ¶9; *Nesbitt Farms*, 2003 WI App 122, ¶11. This only makes sense, given the supreme court's directive that the notice of claim requirements apply to all causes of action, not just those seeking damages. Blaska has failed to establish the second *Oak Creek* factor.

As for the third factor, Blaska argues that the notice of claim requirements are inconsistent with actions seeking only injunctive or declaratory relief. But, it is the purpose of the underlying statute (Act 10) that must be analyzed. *See, e.g.*, *Oak Creek*, 2007 WI App 196, ¶¶11-12. Accordingly, Blaska fails to meet this factor.

B. Blaska has not substantially complied with §893.80.

Blaska's second argument is that he substantially complied with §893.80 because WILL sent two letters to MMSD. *See* Pl. Resp., at 23-24. Citing *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994), Blaska contends that these letters were adequate to meet the requirements of §893.80. Not so. *City of Waukesha* held that for a notice of claim to be sufficient based on substantial compliance: "[T]he written claim must be definite enough to fulfill the purpose of the claim statute — to provide the municipality with the information

[3] The case on which Blaska relies, *Oliveria v. City of Milwaukee*, 2000 WI App 49, 233 Wis. 2d 532, 608 N.W.2d 419, is no different. In that case, the court of appeals did not create a broad rule that the notice of claim requirements do not apply to claims for injunctive relief. Rather, it concluded that the requirements would not apply to the statute at issue (Wis. Stat. § 62.23)(7)(d)) because that statute outlined a specific protest procedure under which the plaintiffs had brought their lawsuit. *See Oliveria*, 2000 WI App 49, ¶¶1, 12 n.3.

necessary to decide whether to settle the claim. The municipality must be furnished with sufficient information so that it can budget accordingly for either a settlement or litigation." *Id.* at 198. WILL's letters do not meet this standard.

First, at the most basic level, WILL's letters failed to provide MMSD with information necessary to settle Blaska's claims ***because they did not identify Blaska as a claimant.*** The letters were sent by WILL, and they do not state that they were being sent on behalf of Blaska. Moreover, WILL itself was not a potential plaintiff in a taxpayer lawsuit because it is a nonprofit based in Milwaukee and does not pay taxes in the District.[4] How can MMSD settle a claim without a claimant? Blaska suggests that MMSD could have simply chosen not to bargain with MTI but this misconstrues what it means to "settle" a claim.

When two parties have conflicting views on an issue, settlement generally does not entail one party simply conceding after being told the other party's position. Rather, settlement generally involves negotiation in an attempt to compromise. WILL's letters to MMSD did not afford MMSD this opportunity because they failed to identify any party with which MMSD could negotiate and settle. The letters did not provide MMSD with the opportunity to budget for settlement or for litigation. How could MMSD assess the potential costs of settlement or litigation without knowing that anyone was credibly threatening suit?

The premise of WILL's argument here is illogical. According to WILL, it can send a demand to a municipality that it does not have standing to sue and thereby excuse any future plaintiff it represents from complying with §893.80. Nothing in Wisconsin law supports this.

C. MMSD did not have actual notice of Blaska's claims.

Blaska's third attempt to overcome his notice of claim failure is to assert that MMSD had actual notice of his claim. MMSD already addressed this argument its initial brief (at 20-21), but

[4] MMSD is filing a contemporaneous motion to deem admitted the requests to admit that address these facts.

there is one additional crucial point: for this exception to apply, Blaska must prove both actual notice ***and*** lack of prejudice to MMSD. Blaska fails to offer any explanation of the latter.

Blaska also incorrectly analogizes this case to *Little Sissabagama Lake Shore Owners Ass'n v. Town of Edgewater*, 208 Wis. 2d 259, 559 N.W.2d 914 (Ct. App. 1997), which involved the review of a property tax exemption decision under Wis. Stat. §70.11(20). In that case, the court found that the County had actual notice of the claim because it had reviewed and decided the tax exemption decision and then, after doing so, received a request for reconsideration from plaintiff. *Id.* at 267. Here, in contrast, MMSD did not review or decide Blaska's claim.

Finally, even if Blaska could establish that MMSD had actual notice, he was still required to provide an itemized claim for relief under §893.80(1d)(b). *See* MMSD Br., at 21. Blaska asks to be excused for this failure but cites no legal authority to support his request. Even Blaska's own actual notice case strictly applied this requirement. *See Little Sissabagama*, 208 Wis. 2d at 267-68. The court of appeals has previously held that the itemized statement of relief sought provision does ***not*** contain a similar "actual notice" and "no prejudice" standard as does the notice of the circumstances provision in (1d)(a). *Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 343, 515 N.W.2d 328 (Ct. App. 1994).[5]

IV. Blaska does not have standing to pursue his claims.

MMSD has already addressed this issue in its initial brief (at 23-28) and in its response to Blaska's summary judgment brief (at 22). But three points must be addressed.

First, at summary judgment, Blaska has the burden to present actual evidence to establish that he has standing. Not only has he failed to establish that he is a resident of the District and a

[5] MMSD has also lost the opportunity to deny Blaska's claim, which would have provided it with a more favorable statute of limitations. Blaska argues that the District "effectively denied the claim," but that is both incorrect and misconstrues the statute. Pl. Resp., at 26. There is no "actual notice" and "no prejudice" exception for a failure to wait for disallowance before filing suit. Under §893.80(1d)(a), these apply only to cure noncompliance with the 120-day notice of circumstances requirement. Disallowance is contained in a different sub-paragraph, (1d)(b), which also addresses the itemized statement for relief. The same reasoning in *Fritsch* applies to disallowance.

taxpayer whose taxes are used to fund the District —facts necessary taxpayer standing — but he has also failed to come forward with any evidence of actual pecuniary harm to taxpayers.

Second, Blaska misconstrues MMSD's argument regarding his failure to put forward any evidence of pecuniary harm to taxpayers. According to Blaska, "[t]he Board and the District assert that they could unilaterally give their employees everything contained in the CBAs and, as a result, there is no harm from them having unlawfully agreed to do so." Pl. Resp., at 27. This is not accurate. There are two issues here: the legality of the CBAs and Blaska's taxpayer standing. As to the CBAs, MMSD is not claiming that it could now, after Act 10 has become effective, unilaterally impose terms and conditions of employment that violate Act 10. Rather, MMSD's position is that the CBAs, which were validly negotiated and executed prior to Act 10 becoming effective, are entitled to their effect.

However, as to standing, MMSD's argument is that none of the costs that Blaska has pointed to demonstrate pecuniary harm to taxpayers. Rather, all of these costs — including the "costs ... beyond salaries" that he cited in his response (PUF ¶ 38) — are costs that MMSD would face even absent the CBAs. They merely reflect MMSD's costs of employing its employees, which are costs that would continue, under MMSD's unilateral authority to set terms and conditions of employment, even if the CBAs were removed. Blaska has pointed to no evidence to the contrary. Blaska's reliance on *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) is misguided. *Hart* dealt with the ***pleading*** standards for taxpayer standing and is not applicable at the summary judgment stage where Blaska must put forward ***evidence*** of standing. In fact, *Hart* makes exactly this point: Even though the pleadings in *Hart* suggested a lack of harm (they suggested a cost savings), the court found taxpayer standing had been pled because it was still ***possible*** that the plaintiffs could put forward ***evidence*** of harm, such as a reduction in

services ***disproportionate to the cost savings***. *Id.* at 700. Thus, for there to be taxpayer standing under *Hart*, there must be evidence that, on balance, taxpayers are worse off. That is not the case here.

Third, Blaska has conceded that absent the CBAs, MMSD has authority to unilaterally impose new terms and conditions of employment. *See* Blaska MTI Resp., at 4 & n.1. This undermines his argument that the CBAs involve an illegal expenditure of public funds (and thereby support taxpayer standing), because MMSD could pay the same salary and benefits that it pays its employees now even absent the CBAs. *See* Pl. Resp., at 30-31. Blaska argues that it "defies common sense" to infer that MMSD's costs would not change absent the CBAs. Pl. Resp., at 30. But he has not put MMSD's evidence in dispute. *See* MMSD Br., at 25-26.

Conclusion

Blaska's claims are not aimed at protecting taxpayers from pecuniary harm but represent only an ideological disagreement he has with MMSD and MTI. This point is illustrated by the combination of Blaska's concession that MMSD may "unilaterally impose new terms and conditions of employment," with his insistence that those terms must be "truly unilateral" (*see* Blaska MTI Resp., at 4 n.1) and may not be the same as those in the CBAs (*see* Pl. Resp., at 31). If the Court sides with Blaska on this point, what can MMSD do? Who decides what is truly unilateral? Blaska? The Court should reject his attempts to micromanage MMSD's decisions.

Relief Sought

MMSD respectfully requests that the Court grant summary judgment in favor of the defendants and dismiss Blaska's claims in their entirety and with prejudice and with costs.

Dated this 22nd day of June, 2015.

Respectfully submitted,

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