STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Norman Sannes,

Plaintiff,

v.

Case No. 15-CV-974

Madison Metropolitan School District Board of Education, et al.,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND FOR AN INJUNCTION

INTRODUCTION

The Plaintiff is a Madison taxpayer. The Defendants are the Madison Metropolitan School District Board of Education, the Madison Metropolitan School District and Madison Teachers, Inc. The Defendants have entered into collective bargaining agreements for the 2014-2015 and the 2015-2016 school years (the "CBAs"). The CBAs violate Act 10 because: (1) the CBAs are the product of unlawful collective bargaining in violation of Wis. Stat. §111.70(4)(mb); (2) the CBAs contain terms that violate Act 10; and (3) the CBAs violate the rights of teachers under Act 10. This is a taxpayer action challenging the legality of the CBAs.

Because there are no material facts in dispute, the Plaintiff seeks summary judgment declaring the CBAs are void, and a permanent injunction prohibiting the implementation of the CBAs. If for any reason the Court determines this case is not ready for final disposition, the Plaintiff requests a temporary injunction prohibiting implementation of the CBAs during the pendency of this proceeding.

The Plaintiff acknowledges he is filing this motion relatively early in this case, but the circumstances are unique. As the Court is aware, there is a very similar case pending in front of the Honorable Richard Niess, involving the same claim by a different taxpayer. The defendants

are identical in both cases and the parties are represented by the same attorneys in both cases. The other case is *Blaska v. Madison Metropolitan School District Board of Education, et al*, Case No. 14-CV-2578. Mr. Blaska asked for the Defendants' consent in that case to simply add the plaintiff in this case as an additional plaintiff in Case No. 14-CV-2578, but the Defendants refused to consent. (McGrath Aff. ¶4.) Thus, Mr. Sannes filed his claim as a separate action. *Id.*

Discovery was conducted in the *Blaska* case and the parties have filed cross-motions for summary judgment in that case. Given the similarities between the two cases there is no reason that this case cannot be resolved by summary judgment at this point in time.

ARGUMENT

Act 10 went into effect on June 29, 2011 – almost four years ago. It was the subject of a series of constitutional challenges, none of which were successful. Almost all of the claims made against the law were rejected by the various trial courts (decisions that were affirmed on appeal), except that one of the Defendants here (Madison Teachers Inc. or "MTI") enjoyed temporary and partial success, persuading a single circuit court judge that Act 10's limitations on collective bargaining were unconstitutional. *Madison Teachers, Inc. v. Walker,* (Dane County Circuit Court Case No. 11CV3774).[1] That decision, however, was error and the Wisconsin Supreme Court reversed it on July 31, 2014. *Madison Teachers, Inc. v. Walker*, 2014 WI 99.

In 2013, following the now reversed circuit court decision, the Defendants negotiated collective bargaining agreements that clearly violate Act 10. Those agreements expired on June 30, 2015. In June of 2014, while *Madison Teachers* was pending before the Wisconsin Supreme Court, the Defendants, seeing the handwriting on the wall (their arguments were losing everywhere else), took the extraordinary step of negotiating new collective bargaining

[1] As explained below, this decision was an outlier. The arguments accepted by the circuit court in *Madison Teachers* were rejected by another branch of the Dane County Circuit Court, the United States District Court for the Western District of Wisconsin, the Seventh Circuit Court of Appeals and, of course, the Supreme Court of Wisconsin.

agreements that have now gone into effect as of July 1, 2015 and continue through June 30, 2016. Those agreements also clearly violate Act 10.

Although the *Madison Teachers* decision was reversed on July 31, 2014, the Defendants argue that the circuit court's decision in that case excuses their current illegal agreement. This is an astonishing argument. Its illogic can, perhaps, be more readily seen outside the politically charged context of Act 10. Imagine hypothetical defendants who own a factory. These defendants challenge a newly enacted minimum wage law as an infringement of the liberty of contract. They convince a sole circuit court and obtain a declaration that the law is unconstitutional. Following that decision and pending appeal, they enter into a series of employment agreements providing for a subminimum wage. Some go into effect immediately. Others begin in the future, following expiration of the earlier agreements.

Assume, finally, that the declaration of the trial court is reversed by the state Supreme Court. It is unimaginable that our hypothetical defendants would be permitted to continue to pay sub-minimum wages in "reliance" on either the pending or executory agreements. Yet that is precisely the argument the Defendants make here.

STATEMENT OF FACTS

The Parties

1. The Defendants are the Madison Metropolitan School District Board of Education (the "Board"), the Madison Metropolitan School District ("the District") and Madison Teachers Inc. ("MTI"). (Complaint ¶¶4-6; Answers ¶¶4-6.)

2. The plaintiff is Norman Sannes. Mr. Sannes is a resident of the City of Madison and a taxpayer whose taxes are used to fund the District. (Sannes Aff. ¶ 1.)

The Passage of Act 10

3. In 2011, the Wisconsin Legislature changed the statutes that govern collective bargaining between public employees and their employers. (Complaint ¶9; Answers ¶9.)

4. In March 2011, when the Wisconsin Legislature passed Act 10, it significantly altered Wisconsin's public employee labor laws. Act 10 prohibits general employees from collectively bargaining on issues other than base wages, prohibits municipal employers from deducting labor organization dues from paychecks of general employees, imposes annual recertification requirements, and prohibits fair share agreements requiring non-represented general employees to make contributions to labor organizations. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶1.

Collective Bargaining by the Defendants

5. The Defendants collectively bargained and reached collective bargaining agreements for the 2014-2015 and the 2015-2016 school years after the passage of Act 10. (Complaint ¶13, 15, 17, 18, 21, and 22; Answers ¶13, 15, 17, 18, 21, and 22; Responses to Request to Admit 1-3[2]; McGrath Aff. Ex. 1.)

6. Specifically, in May, 2013, MTI requested that the District collectively bargain a contract for the 2014-2015 school year.[3] The District and the Board agreed to do so and such collective bargaining occurred in September 2013. (Complaint ¶15; Answers ¶15.)

7. A copy of a joint letter from the District and MTI describing the decision to collectively bargaining and the dates for such bargaining is attached to the Complaint as Exhibit A. *Id.*

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[2] The discovery responses relied upon herein were made by the Board and the District in Case No. 14-CV-2578. The Board and the District were represented by the same counsel in that case as in this case.

[3] The "20114-2015 school year" is from July 1, 2014 through June 30, 2015.

8. As a result of the collective bargaining which occurred in September, 2013, on October 7, 2013, the Board ratified collective bargaining agreements for the 2014-2015 school year with the five separate bargaining units represented by MTI. (Complaint ¶17; Answers ¶17)

9. Copies of the 2014-2015 collective bargaining agreements were produced by the Board and the District in discovery in Case No. 14-CV-2578 and are attached to the McGrath Affidavit filed herewith as Exhibit 3. (McGrath Aff. ¶ 5, Ex. 3.)

10. On May 15, 2014, the Board voted unanimously to enter into collective bargaining with MTI's five bargaining units for an additional year, namely 2015-2016.[4] (Complaint ¶18; Answers ¶18.)

11. After the Board's vote on May 15, 2014, representatives of the Board and/or the District met and collectively bargained with MTI on behalf of 5 separate bargaining units. (Complaint ¶21; Answers ¶21.)

12. On June 2, 2014, those representatives reached tentative agreements on a collective bargaining agreement for the 2015-2016 school year. (Complaint ¶22; Answers ¶22.)

13. On June 3, 2014, the membership of MTI's five bargaining units ratified the tentative agreements and on June 4, 2014, the Board unanimously approved the tentative agreements. *Id.*

14. Summaries of the 2015-2016 collective bargaining agreements were prepared by both the District and by MTI. (Complaint ¶27; Answers ¶27.)[5] Copies of the summaries are attached to the Complaint as Exhibits D and E.

15. The Plaintiff requested copies of the 2015-2016 CBAs in discovery in Case No. 14-CV-2578 but was told that "A signed copy of the 2015-2016 collective bargaining

[4] The "2015-2016 school year" is from July 1, 2015 through June 30, 2016.
[5] The summaries are admissible under Wis. Stat. 908.01(4)(b).

agreements between the District and MTI is not available. The terms of the tentative agreements between the District and MTI are reflected in the letter attached as Exhibit D to plaintiff's complaint." (Response to Request to Admit No. 3; McGrath Aff. Ex. 1.)

16. There are currently five collective bargaining agreements in place between the District and MTI for the 2014-2015 school year and the Defendants have entered into five collective bargaining agreements for the 2015-2016 school year. (Complaint ¶23; Answers ¶23.)

17. The District is spending substantial amounts of taxpayer money implementing the CBAs. In its last full completed school year (2013-2014) the District's expenses for salaries and benefits totaled $327,404,731, which was 73.7% of the total budget for that year. (McGrath Aff. ¶6, Ex. 4.)

Notices Objecting to the Collective Bargaining.

18. October 3, 2013, Attorney Richard Esenberg of the Wisconsin Institute for Law & Liberty wrote to the District and stated that:

> If the School District were to collectively bargain in a way that violates Act 10, it would be exposed to litigation by taxpayers or teachers who do not wish to be bound to an unlawful agreement or to be forced to contribute to an organization that they do not support.

A copy of the October 3, 2013 letter is attached to the McGrath Affidavit filed herewith. (McGrath Aff. ¶7; Ex.5.)

19. On May 15, 2014, Attorney Esenberg wrote a letter to the Board informing them that Act 10 prohibits terms in collective bargaining agreements that are inconsistent with the provisions of Act 10. A copy of the May 15, 2014 letter from Attorney Esenberg is attached to the McGrath Affidavit filed herewith. (McGrath Aff. ¶8; Ex.6.)

20. On November 26, 2014, Plaintiffs' counsel wrote a letter to the Board and the District, a true and correct copy of which is attached to the Sannes Affidavit filed herewith as Exhibit 2. (Sannes Aff. ¶ 3, Ex.2.)

21. The November 26th letter informed the Board and the District that the CBAs were illegal and, among other things, requested an acknowledgment that the CBAs are unlawful, void, and of no force and effect; and the cessation of any and all actions by the Board and/or the School District to implement or enforce the CBAs. *Id.*

22. In response to the November 26th letter, Plaintiff received a notice of disallowance from the Board and the District dated March 24, 2015. A true and correct copy of the March 24, 2015 notice of disallowance is attached to the Sannes Affidavit filed herewith as Exhibit 3. (Sannes Aff. ¶ 4, Ex.3.)

ARGUMENT

In March 2011, when the Wisconsin Legislature passed Act 10, it significantly altered Wisconsin's public employee labor laws. Act 10 prohibits general employees from collectively bargaining on issues other than base wages, prohibits municipal employers from deducting labor organization dues from paychecks of general employees, imposes annual recertification requirements, and prohibits fair share agreements requiring non-represented general employees to make contributions to labor organizations. (SOF ¶4) [6]

After the passage of Act 10, and despite its enactment, the Defendants collectively bargained and reached collective bargaining agreements for the 2014-2015 and 2015-2016 school years. The Board and the District admit that they collectively bargained with MTI after Act 10 and that such collective bargaining led to the CBAs. (SOF ¶5)

[6] Citations to "SOF" refers to the Statement of Facts at pages 4-7, supra.

Act 10 Litigation

In the wake of its passage by the Legislature, several lawsuits were filed challenging the validity of Act 10 on constitutional or other grounds. On September 14, 2012 a Dane County Circuit Court Judge held that Act 10 was unconstitutional in *Madison Teachers, Inc. v. Walker*, Case No. 11-CV-3774, but that decision was reversed by the Wisconsin Supreme Court on July 31, 2014. *Madison Teachers, Inc. v. Walker*, 2014 WI 99. Act 10 has been upheld in every legal challenge to the law. *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013), *Wisconsin Law Enforcement Ass'n v. Walker*, Dane County Circuit Court No. 12CV4474; *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014), and *Madison Teachers, Inc. v. Walker*, 2014 WI 99 (Wisconsin Supreme Court, July 31, 2014).

The CBAs

The 2014-2015 CBAs are in the record before the Court. (SOF ¶9.) The Plaintiff requested copies of the 2015-2016 CBAs in discovery but were told that none are available. (SOF ¶15.) However, summaries of the 2015-2016 CBAs produced by the District and by MTI are available and are in the record as Exhibits D and E to the Complaint. (SOF ¶14.)

The Court can see from the CBAs themselves that they contain numerous provisions which are unlawful subjects of collective bargaining under Act 10.[7] The 2014-2015 CBAs contain provisions dealing with negotiating rules (MMSD 000169),[8] grievance procedures (MMSD 000170-171), a salary schedule that includes items other than base wages (MMSD 000171-173; 175-186), payroll deductions including union dues (MMSD 000173-174), "fair share" (MMSD 000174), assignments (MMSD 000187-189), evaluations (MMSD 000190),

[7] Each page of the documents produced in discovery was individually "bates stamped." The references to "MMSD ########" are references to the bates stamp number that appear on the relevant pages.

[8] The specific pages cited in this paragraph are all from the Master Contract (MMSD 000167-000235). There are similar provision in each of the individual CBAs with the individual bargaining units (MMSD OOOO55-000166; 000236-339)

administrative leave (MMSD 000191), discipline/dismissal (MMSD 000191-192), retirement (MMSD 000193), academic freedom (MMSD 000196), hours of work (MMSD 000199, health insurance (MMSD 000209-211), etc.

All of these topics are prohibited subjects of collective bargaining under Act 10. See, Wis. Stat. §111.70(4)(mb). The 2014-2015 CBAs total 284 pages and virtually every page contains provisions that are not the lawful subject of collective bargaining. Even the salary section goes far beyond base wages (MMSD 000171-173; 175-186). In fact, the CBAs so pervasively violate Act 10 that there is no practical way to save any part of them. Under the law, the Defendants were not permitted to collectively bargain on the terms and conditions contained in the CBAs.

The same is true of the 2015-2016 CBAs. A copy of the summary of the 2015-2016 CBAs published by the District is attached to the Complaint as Exhibit D. (SOF ¶14.) A copy of the summary of the 2015-2016 contract published by MTI is attached to the Complaint as Exhibit E. *Id.* The District's summary describes the "major elements" of the 2015-2016 contracts to include precisely the same provisions as are contained in the 2014-2015 Agreements. The topics listed in the District's 2015-2016 summary match the section headings in the 2014-2015 CBAs. The summary provided by MTI is consistent and describes provisions that are not permissible under Act 10, including provisions on working conditions, fringe benefits, healthcare, and sick leave.

I. THE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT.

A. *Act 10 is Constitutional and Applicable to the Parties to this Case.*

The Defendants assert in their Answers that their collective bargaining and the resulting CBAs were not in violation of Act 10 based upon their assertion that Act 10 does not apply to

them because of the declaratory judgment ruling of Judge Colas in the *Madison Teachers* case. (Answers ¶¶ 23; Board and District Aff. Def. ¶54.) But the existence of the decision by Judge Colas (before it was reversed) is no defense to this action.

First, neither the District nor the Board was a party to the *Madison Teachers* case. Thus, they have no basis to rely upon the decision of Judge Colas, even if that decision had not been reversed. The circuit court's declaratory judgment ruling in that case had no legal effect on anyone other than the parties to that case. *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) aff'd, 193 Wis. 2d 50, 532 N.W.2d 124 (1995) ("circuit court decision is neither precedent nor authority"); *Raasch v. City of Milwaukee*, 2008 WI App 54, 310 Wis. 2d 230, 240, 750 N.W.2d 492, 497 ("[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* "precedential.") (emphasis in original). The District and the Board had the obligation to follow Wisconsin law and they simply refused to do so.

Second, the taxpayers in the school district were not parties to the *Madison Teachers* case. Their rights cannot be taken away by a declaratory judgment to which they were not a party. See, Wis. Stat. §806.04 ("no declaration may prejudice the right of persons not parties to the proceeding"). The Defendants were not free to violate the rights of taxpayers based upon the declaratory judgment ruling by Judge Colas.

Third, when the Defendants began collective bargaining on the 2014-2015 agreement in September, 2013, the Seventh Circuit had already declared Act 10 to be constitutional. *WEAC v. Walker*, 705 F. 3d 640 (7th Cir. 2013). While certain of the arguments made in *WEAC* were different than those advanced in *Madison Teachers*, the arguments made there were also rejected by the United States District Court and the Seventh Circuit. *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014) They were also rejected by another branch of the Dane

County Circuit Court in *Wis. Law Enforcement Assoc. v. Walker*, Case No. 12-CV-4474, Decision and Order dated October 25, 2013 (Markson, J.).[9] In May, 2014 when the Defendants began collective bargaining on the 2015-2016 collective bargaining agreements, they were aware of both of these decisions and, of course, that *Madison Teachers* itself had been argued before the state Supreme Court and had been submitted for decision. If the Defendants decided to cherry pick and ignore the decisions of the Seventh Circuit and Judge Markson in favor of the decision by Judge Colas, they did so at their own risk.

Fourth, even MTI, which was a party to the *Madison Teachers* case, cannot rely upon it here. Once the decision was reversed it was as if it never existed. It is not and never was the "law." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶44, 339 Wis.2d 125, 810 N.W.2d 465. As explained by the Wisconsin Supreme Court in that case:

> "when a decision is overruled, it does not merely become bad law, --- it never was the law, and the later pronouncement is regarded as the law from the beginning." (quoting previous decisions).

This rule of law is based on the Blackstonian doctrine that "'courts declare but do not make law." *Id.*

This case is similar to the situation in *Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1, 6 (1993). In that case an insurance company had received a declaratory judgment that there was no coverage under its insurance policy and, as a result, failed to provide a defense. The insured went to trial and lost. The declaration was later reversed and the Wisconsin Supreme Court said this about the insurance company's decision to rely on the declaration while it was under appeal:

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[9] A copy of the Decision and Order in *Wis. Law Enforcement Assoc. v. Walker* is attached to the McGrath Aff. as Exhibit 7.

> Citizens argues that it was entitled to rely on the circuit court's determination that there was no coverage under the policy. However, the circuit court's no coverage determination was not a final decision because it was timely appealed. An insurance company breaches its duty to defend if a liability trial goes forward during the time a no coverage determination is pending on appeal and the insurance company does not defend its insured at the liability trial. When an insurer relies on a lower court ruling that it has no duty to defend, it takes the risk that the ruling will be reversed on appeal.

The same is true here. The Defendants took the risk that Judge Colas' decision would be upheld. That decision by the Defendants was doubly risky given the existing contrary decisions by the Seventh Circuit and Judge Markson holding that Act 10 was constitutional. The Defendants were wrong. Their risk taking cannot be an excuse to prejudice the rights of other parties.

The Defendants will rely upon *Slabosheske v. Chikowske*, 273 Wis. 144, 77 N.W. 2d (1956),[10] but that case does not go as far as the Board and the District would like it to go. That case dealt with the effect of a judgment (later reversed) in a subsequent proceeding involving one of the parties to the judgment **and** where the party to the judgment was seeking to avoid the effect of the judgment.

In *Slabosheske* the issue was the effect of a circuit court judgment as to whether a school district known as District No. 7 had been properly dissolved. The circuit court found that District No. 7 had not been properly dissolved and that the District still existed. This decision was later reversed. In the interim, District No. 7 borrowed money and issued a promissory note. The note went unpaid and the holders sued. A defense was raised that District No. 7 did not lawfully exist at the time the note was given and its actions were null and void. In other words, there was an attempt by a party bound by the circuit court judgment to avoid paying a lender who had relied on the judgment in good faith.

[10] The Defendants relied upon this case in their summary judgment briefs in Case No. 14-CV-2578.

The Wisconsin Supreme Court concluded that the plaintiffs who received the promissory note should have been able to rely on the circuit court's judgment that the school district still existed (even though that judgment was later reversed). *Slabosheske*, 273 Wis. at 150. The Supreme Court set forth the legal rule as follows: "Until set aside in a proper proceeding for that purpose, a voidable judgment has the same force and effect as though no error had been committed; *it will support proceedings taken under it.*" *Id.* at 150 (emphasis added). Such a rule was necessary according to the Supreme Court in order to protect "those who acted in good faith in reliance upon [the judgment]." *Id.*

But under *Slabosheske* and its progeny,[11] the rule with respect to judgments that are reversed on appeal is that a person may enforce such a judgment **against a party to the judgment**, until the judgment is reversed. The Defendants cannot cite any case enforcing a circuit court judgment (later reversed) against any person that was not a party to the judgment. That is a critical distinction because no one in this case is attempting to enforce the circuit court decision in *Madison Teachers* against a party to that case (which is all that *Slabosheske* allows). Instead, non-parties (the Board and the District) are attempting to enforce that judgment against another non-party, the Plaintiff. Allowing that would be giving precedential authority to the circuit court's decision in *Madison Teachers* and everybody agrees that the circuit court's decision was not precedent.

This was made abundantly clear by what the Wisconsin Supreme Court did, in the context of the *Madison Teachers* case, itself. When Judge Colas held the defendants in contempt for applying Act 10 to non-parties, the Supreme Court vacated the ruling holding that Judge Colas' declaratory judgment decision did not apply to non-parties. *Madison Teachers, Inc. v.*

[11] *Harris v. Harris*, 141 Wis. 2d 117, 415 N.W. 2d 596 (Ct. App, 1987), *Kett v. Community Credit Plan, Inc.* 222 Wis. 2d 117, 586 N.W. 2d 68 (Ct. App. 1998) and *Virnich v. Vorwald*, 664 F. 3d 206 (7th Cir. 2011)

Walker, 2012AP2067, Nov. 21, 2013 Order, ¶20 (McGrath Aff. ¶ 10, Ex.8.) The Supreme Court said that because there was only a declaration and not an injunction that WERC (which was a party to the case) was free to apply Act 10 to non-parties. Thus, even though WERC was a defendant and bound by the declaration of Judge Colas, that declaration only applied to WERC's dealings with MTI and not WERC's dealings with other parties. The concomitant must also be true. MTI was entitled to the benefit of Judge Colas' declaration but only in its dealings with the defendants in that case, and not in its dealings with non-parties such as the Board, the District or the Plaintiff.

In a similar case from Kenosha County (involving a claim that a school district had illegally collectively bargained after the effective date of Act 10), Judge Bastianelli considered this precise issue at length, including considering *Slabosheske* and firmly disagreed with the argument advanced by the Board and the District. *Lacroix v. Kenosha Unified School District*, Case No. 13-CV-1899, March 19, 2015 Decision and Order at 6-8. (See McGrath Aff. ¶11. Ex. 9). Of course, this Court is free to disregard Judge Bastianelli's decision, but that is the point. Except for the parties to the case, no one is bound by a circuit court decision. Moreover, the parties to that case cannot use it offensively as a sword against non-parties. That would make the decision precedent, which it was not.

Act 10 has been constitutional and applicable to the Defendants since the day it was adopted. The erroneous and subsequently reversed decision by Judge Colas does not immunize the Defendants from violating the law. Perhaps the Defendants could argue that because they were relying on the decision of Judge Colas they should not be held liable for damages for conduct that occurred prior to July 31, 2014 (the date of the Wisconsin Supreme Court's decision in *Madison Teachers*) but that issue is not before the Court. The Plaintiff is not seeking such

damages. The Defendants' first round of collective bargaining occurred at a time when the 7th Circuit had declared Act 10 to be constitutional and its second round of collective bargaining occurred at a time when Judge Markson had also ruled that Act 10 was constitutional. Moreover, the unlawful conduct is now continuing past the date that the Wisconsin Supreme Court reversed Judge Colas. In fact, the Defendants contend that they can rely on Judge Colas' decision to justify a contract that did not even come into existence until July, 2015. That argument is flatly contrary to authority from the Wisconsin Supreme Court.

Act 10 has been upheld as constitutional by the Wisconsin Supreme Court. The Wisconsin Supreme Court's decision is binding precedent on this Court. There is no basis for the Defendants to argue that they can continue to enforce contracts that violate Act 10.

B. The CBAs Are Void Because They Violate Act 10.

There are numerous provisions in the CBAs which violate Act 10. Section 111.70(4)(mb) expressly prohibits municipal employers such as the District from bargaining collectively with a union representing its employees with respect to any of the factors or conditions of employment except for total base wages. Base wages do not include overtime, premium pay, merit pay, pay schedules, or automatic pay progression. Wis. Stat. §111.70(4)(mb). Thus, any provision in the CBAs other than base wages is unlawful.

The CBAs contain provisions dealing with negotiating rules, grievance procedures, a salary schedule that includes items other than base wages, payroll deductions including union dues, "fair share," assignments, evaluations, administrative leave, discipline, retirement, academic freedom, hours of work, health insurance, etc (See, page 9, supra.) All of these provisions are expressly prohibited by Wisconsin law. It has been the law of Wisconsin for well over one hundred years that a contract made in violation of the law is void. *Melchoir v.*

McCarty, 31 Wis. 252 (1872) ("The general rule of law is, that all contracts which are . . . contrary to the provisions of a statute, are void . . . ."); *Abbot v. Marker*, 2006 WI App 174, ¶6, 295 Wis. 2d 636, 722 N.W. 2d 162 ("A contract is considered illegal when its *formation* or performance is forbidden by civil or criminal statute . . . .") (emphasis added).

This is as true for labor agreements as it is for other contracts. *Bd. of Ed. of Unified Sch. Dist. No. 1 v. WERC*, 52 Wis. 2d 625, 635, 191 N.W.2d 242, 247 (1971) ("A labor contract term that is violative of public policy or a statute is void as a matter of law."); *Glendale Prof'l Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594, 602 (1978) ("When an irreconcilable conflict exists [between law and a labor agreement], we have held that the collective bargaining agreement should not be interpreted to authorize a violation of law."). Because the CBAs were collectively bargained in violation of Act 10, and contain terms impermissible under Act 10, they are void as a matter of law and the Plaintiff is entitled to summary judgment on his claim for a declaratory judgment.

II. THE PLAINTIF IS ENTITLED TO AN INJUNCTION PROHIBITING THE CONTINUED ENFORCEMENT OF THE CBAs.

Section 813.02 Wis. Stats. provides that "when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act." The standards for the issuance of an injunction under Section 813.02 are well-known:

> The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 519-20, 259 N.W.2d 310, 313-14 (1977).

The standards for a permanent injunction are essentially the same. *Diamondback Funding, LLC v. Chili's of Wisconsin, Inc.*, 2007 WI App 162, 303 Wis. 2d 746, 735 N.W.2d 193. Permanent injunctions are designed to prevent injury, are issued upon proof of a sufficient threat of future irreparable injury, and it is not necessary to wait until injury has been done. *Id.*

The Plaintiff can meet each of the requirements for an injunction[12].

A. The Plaintiff has a High Probability of Success on the Merits.

Act 10 has been upheld as constitutional by the Wisconsin Supreme Court and the United States Court of Appeals for the Seventh Circuit. The Wisconsin Supreme Court's decision is binding precedent on this Court. There is no basis for the Defendants to argue that they can continue to enforce a contract that violates Act 10. As shown above, the Plaintiff is entitled to summary judgment as part of this motion. That constitutes a high probability of success on the merits.

B. *The Plaintiff Lacks an Adequate Remedy at Law and Will Be Irreparably Harmed if the CBAs Continue to be Enforced.*

As a taxpayer, the Plaintiff is harmed by the spending of tax money for an unlawful purpose. "A taxpayer [has] a financial interest in public funds" and "*[a]ny* illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *S.D. Realty Co.* 15 Wis. 2d 15, 22 (1961) (emphasis added). Taxpayers sustain a pecuniary loss because an illegal expenditure will either (a) require additional taxes, or (b) cause the governmental unit to have less money to spend on legitimate purposes. *Id.* As a taxpayer, Plaintiff has a financial

[12] The Plaintiff seeks both a permanent and a temporary injunction in this motion. If the Court for any reason determines that the matter is not ripe for final disposition and a permanent injunction then the Plaintiff seeks a temporary injunction during the pendency of the proceeding.

interest in public funds akin to that of a stockholder in a private corporation and he sues not only in his own right, but as a representative of all taxpayers. *Id.*

Here, the District is spending substantial amounts of taxpayer money on a contract that is illegal. In its last full completed school year (2013-2014) the District's expenses for salaries and benefits alone totaled $327,404,731, which was 73.7% of the total budget for that year. (SOF. ¶ 17.) As a taxpayer, the Plaintiff is harmed by spending hundreds of millions of dollars under an illegal contract. More importantly, for purposes of irreparable harm, once this money is spent there is no way for the taxpayers to get the money back. Thus, the harm is irreparable.

Further, the Wisconsin Supreme Court has held that unlawful activity may be enjoined even in the absence of an express showing of irreparable harm. *Joint School Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n,* 70 Wis. 2d 292, 309-310, 234 N.W. 2d 389 (1975). "The express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public." *Id.*

Moreover, taxpayers are also harmed because the CBAs subject the District (and, as a result, taxpayers) to future claims by teachers. Teachers have a right not to have to pay union dues under Wis. Stats. §§111.70(2) and under the First Amendment. "[C]ompulsory [union] fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2298 (2012) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Given that "'freedom of association . . . plainly pre-supposes a freedom not to associate,'" *Knox*, 132 S. Ct. at 2288 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)), the District and the Board infringe on First Amendment rights when they compel association and payment of dues under the CBAs. By

taking away teachers' statutory and First Amendment rights, the District and the Board expose the District to potential financial claims by teachers which could be substantial. The only way to protect taxpayers who would ultimately have to pay such claims is to prohibit the CBAs from continuing to be enforced. Taxpayers have no remedy to prevent the ongoing harm they are suffering other than to seek an injunction.

In their responsive pleadings, the Defendants argue there is no harm here because the Board could unilaterally impose the same terms and conditions as contained in the CBAs. But that argument is without merit for two reasons. First, the Board did not impose these terms and conditions unilaterally. It unlawfully bargained them. So what the Defendants are really saying is that if the CBAs are declared void the Board would respond by claiming that its new decision is to impose these same terms and that would be a "unilateral" decision by the Board. But that ignores the fact that illegal acts have consequences. The collective bargaining was illegal. The terms agreed upon cannot be enforced even if the Board now says that it wants to impose them unilaterally. It would be the same thing as competitors saying that if a court says their price-fixing agreement is illegal there is no harm caused by the price-fixing because each competitor could unilaterally impose the same price that they had previously agreed upon. No they cannot! It is still price fixing.

Second, the Board cannot unilaterally impose any terms and conditions that it wants to impose. It cannot impose a "fair share" provision unilaterally. It cannot deduct or authorize the District to deduct union dues from employees' payroll checks. It cannot increase wages greater than permitted by Wis. Stat. §111.70(4)(mb)(2). It cannot violate the provisions on health insurance and pension contributions including those contained in Wis. Stat. §§40.05 and 66.0518.

The terms and conditions in the CBAs are illegal. As a result, the CBAs should be declared void. Once that occurs, the Board will then have to decide on new terms and conditions. They will need to do so in a manner consistent with Act 10 (and consistent with the Open Meetings Law) and subject to the possibility that they will be sued again if they re-impose the results of their illegal collective bargaining.

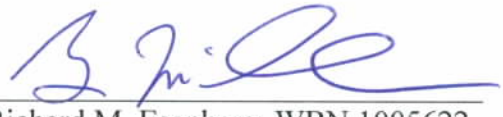
There is a substantial public harm occurring here. The Defendants are acting in a manner expressly forbidden by state law. The result of that conduct is ongoing harm to the Plaintiff as a taxpayer and to the public that can only be prevented by an injunction. No remedy other than an injunction is adequate to prevent this harm.

RELIEF SOUGHT

For the reasons set forth herein the Plaintiff requests summary judgment declaring that the CBAs are void, and for an injunction prohibiting further enforcement of the CBAs. If for any reason the Court determines this case is not ready for final disposition, the Plaintiff requests a temporary injunction prohibiting enforcement of the CBAs during the pendency of this proceeding.

Dated this 14th day of July, 2015.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff



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