

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN**

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OPERATING ENGINEERS OF WISCONSIN,  
IUOE LOCAL 139 AND LOCAL 420, *et al.*,

Plaintiffs,

CIVIL ACTION

v.

NO. 18 C 285

TONY EVERS, in his official capacity as  
Governor; JOSH KAUL, in his official  
capacity as Attorney General for the State  
of Wisconsin; and, JAMES J. DALEY, in his  
official capacity as Chairman of the Wisconsin  
Employment Relations Commission,

JUDGE LYNN ADELMAN

Defendants.

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**PLAINTIFFS' RESPONSE TO DEFENDANTS'  
RULE 12(b) MOTION TO DISMISS <sup>1</sup>**

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Plaintiffs, Operating Engineers of Wisconsin, IUOE Local 139 and Local 420, *et al.*  
("Plaintiffs), by and through their attorneys, hereby file their response to Defendants' Rule 12(b)  
Motion to Dismiss and state as follows:

1. On February 23, 2018, Plaintiffs filed a Complaint challenging the Constitutionality  
of 2011 Wisconsin Act 10 (Act 10). Then Governor Scott Walker, then Attorney General Brad  
Schimel and James J. Daley, Chairman of the Wisconsin Employment Relations Commission, were  
named as Defendants in their official capacities.

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<sup>1</sup> For the reasons set forth herein, all other pending motions in this matter should be denied as moot  
and, therefore, no additional response from Plaintiffs to such motions is necessary.

2. On May 11, 2018, Plaintiffs filed a Notice of Voluntary Dismissal (“Voluntary Dismissal”) pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). As Defendants argued, this Dismissal terminated the Plaintiffs’ cause of action, divesting this Court of jurisdiction.

3. In May 2019, Plaintiffs filed an Amended Complaint, naming Governor Tony Evers and Attorney General Josh Kaul as Defendants in their official capacities, replacing Scott Walker and Brad Schimel. Thereafter, three individual members of Local 139 joined as Plaintiffs and a Second Amended Complaint was filed by Plaintiffs.

4. On July 11, 2019, Defendants filed their Rule 12(b) Motion to Dismiss, arguing that this Court is without jurisdiction to proceed in light of Plaintiffs’ Voluntary Dismissal in May 2018. Upon review of Defendants’ Rule 12(b) Motion to Dismiss, the reasons set forth therein regarding the Court’s lack of jurisdiction and legal precedent, Plaintiffs acknowledge that the Amended Complaint filed in May 2019 and the Second Amended Complaint were improvidently filed as a result of the Voluntary Dismissal filed in May 2018.

5. Since Plaintiffs’ Voluntary Dismissal terminated the Complaint, it also “divested the Court of jurisdiction” and all subsequent filings should be denied as moot.” *See, Crook v. NMC Mortg. Corp.*, 2006 WL 2873439@ \*2 (S.D. Ill. 2006), citing to *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077-78 (7<sup>th</sup> Cir. 1987); *Bryan v. Smith*, 174 F.2d 212, 214 (7<sup>th</sup> Cir. 1949); *Piper Jaffray & Co. v. Severini*, 2006 WL 2278012 at \*3 (W.D. Wis. Aug. 8, 2006); *Hinsdale v. Farmers Nat’l Bank & Trust Co.*, 823 F.2d 993, 996 (6<sup>th</sup> Cir. 1987).

6. In light of the above, it is unnecessary to respond to the other arguments Defendants raise in their Motion to Dismiss. Indeed, as Defendants correctly note, Plaintiffs can refile a new complaint and intend to do so.

7. After consideration of the legal precedent and in the interest of judicial economy, Plaintiffs do not oppose Defendants' Motion to Dismiss and in light of the Court's lack of jurisdiction, the Court should strike Plaintiffs' Second Amended Complaint and deny all subsequent pleadings as moot.

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that the Court enter an Order striking Plaintiffs' Second Amended Complaint and denying as moot all motions filed thereafter.

Respectfully submitted,

Dated: August 1, 2019

/s/ Brian C. Hlavin

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## CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on or before the hour of 5:00 p.m. on August 1, 2019, he electronically filed the foregoing document (Plaintiffs' Response to Defendants' Rule 12(b) Motion to Dismiss) with the Clerk of Court using the ECF system, which will provide notification to the following ECF participants:

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