STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

VICTORIA MARONE

Plaintiff,

v. Case No. 13-CV-004154

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT,

Defendant,

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

Intervenor-Defendant.

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO MILWAUKEE AREA TECHNICAL COLLEGE'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Milwaukee Area Technical College ("MATC") seeks to have Ms. Marone's entire Complaint dismissed, arguing that she failed to comply with notice of claim requirements and that she lacks standing to bring this lawsuit. MATC argues in the alternative that at the very least, Ms. Marone's claim for attorney fees under Wis. Stat. § 133.18(3) should be dismissed. However, as shown below, the notice of claim requirements do not apply to this lawsuit, Ms. Marone has standing to challenge the legality of a contract to which she is a party, Chapter 133 is ambiguous as to the availability of attorney fees, and MATC cannot benefit from qualified immunity in this case. As a result, MATC's motion should be denied.

STATEMENT OF UNDISPUTED FACTS

Ms. Marone agrees with MATC's statement of undisputed facts, with the following disagreements and additions.

Ms. Marone disputes MATC's characterizations of Act 10 as "in limbo." (MATC Br. 6.) The issue of Act 10's constitutionality and applicability to the parties to this case is a question of

law, not of fact. Furthermore, statutes enjoy a strong presumption of constitutionality. *In re Diana P.*, 2005 WI 32, ¶16, 279 Wis. 2d 169, 694 N.W.2d 344. And circuit court rulings have no applicability to parties not in front of that court. *See 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) ("[A] circuit court decision is neither precedent nor authority"); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 750 N.W.2d 492 ("[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* 'precedential.'") (emphasis in original). Sec. 806.04(11), moreover, makes clear that no declaration may prejudice the right of persons not parties to the proceeding." Act 10 is the law of Wisconsin and applies to everyone but the parties to *Madison Teachers v. Walker* unless and until the Supreme Court of Wisconsin says otherwise.

Although not directly relevant to this Motion, Ms. Marone disputes MATC's claim that the conditional language located on the top of the "Summary of Proposed Labor Agreement" is a "component" of the "Conditional Successor Agreement" (the actual contracts entered into between MATC and Local 212). (*See* MATC Br. 6.) Nothing in the pleadings indicates that this conditional language is found within the contracts themselves, and materials in the record in support of the Plaintiff's earlier motion for summary judgment confirm that the conditional language does not appear within the contracts. (*See* Plaintiff's Brief in Support of Motion for Summary Judgment 9, Kamenick Aff. ¶7, Ex. 3.) MATC also acknowledges an ongoing dispute as to the effect of that language. (MATC Br. 2, n. 4.)

Ms. Marone also disputes that the February 26, 2013 letter contained "no mention whatsoever of Marone or any other potential claimant." (MATC Br. 7.) The letter mentions "taxpayers" repeatedly as claimants, and Ms. Marone, as a resident of Milwaukee (Compl. ¶3) is an MATC taxpayer. The letter also necessarily infers the existence of claimants by its repeated references to potential litigation. (Compl., Ex. B.)

Finally, Ms. Marone disputes that "MATC received no communications regarding the claims alleged in this suit or Marone's individual concerns until MATC was served with the complaint." MATC relies on nothing other than the bald assertion of its attorney in support of that claim; nothing in the pleadings establishes that fact.

Ms. Marone submits the following additional information about the litigation surrounding Act 10. In the wake of its passage by the Legislature, several lawsuits were filed that challenged

the validity of Act 10 on constitutional or other grounds. The U.S. District Court for the Western District of Wisconsin dismissed many of these challenges and, on appeal, the U.S. Court of Appeals for the Seventh Circuit dismissed all challenges to the statute on federal constitutional grounds. *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013). The parent organization of Intervenor-Defendant American Federation of Teachers, Local 212, WFT, AFL-CIO ("Local 212"), AFT-Wisconsin, AFL-CIO, was a losing party to that case.

On September 11, 2013, the U.S. District Court of the Western District of Wisconsin upheld Act 10 against a related constitutional challenge, dismissing that case as well. *Laborers Local 236, AFL-CIO v. Walker*, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013). On October 23, 2013, the Dane County Circuit Court, the Honorable John Markson, presiding, upheld Act 10 against another constitutional challenge brought by state employees and a union representing them, dismissing that case. *Wisconsin Law Enforcement Association v. Walker*, Dane County Circuit Court No. 12CV4474.

The contempt ruling by Judge Colás has since been vacated by the Supreme Court of Wisconsin. *Madison Teachers, Inc. v. Walker*, 2012AP2067, Nov. 21, 2013 Order. The supreme court ruled that the circuit court had exceeded its authority by "expand[ing] the scope of the September 2012 declaratory judgment by granting injunctive relief to non-parties." *Id.*, ¶20.

ARGUMENT

"A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents." *DeBraska v. Quad Graphics, Inc.*, 2009 WI App 23, ¶12, 316 Wis. 2d 386, 763 N.W.2d 219, quoting *Jares v. Ullrich*, 2003 WI App 156, ¶8, 266 Wis. 2d 322, 667 N.W.2d 843. When deciding a motion for judgment on the pleadings, the court "look[s] at the complaint to determine whether it states a claim." *Helnore v. DNR*, 2005 WI App 46, ¶2, 280 Wis. 2d 211, 694 N.W.2d 730. The court must "construe the complaint liberally, accepting as true all facts alleged and drawing all reasonable inferences from those facts in the plaintiff's favor." *Id.* If the court determines that the complaint states a claim, the court "determine[s] whether the responsive pleading reveals any material factual issues." *Id.*

Wisconsin has liberal pleading requirements, and "a claim will be dismissed on the pleadings only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Kleinke v. Farmers Co-op. Supply & Shipping*, 202 Wis. 2d 138, 143, 549 N.W.2d 714, 715-16, quoting

Morgan v. Pennsylvania Gen. Ins. Co., 87 Wis. 2d 723, 737, 275 N.W.2d 660 (1979). "[A] court must view the complaint most favorably to the plaintiff and accept its allegations as true."

Ms. Marone's Complaint meets this standard. It clearly states a claim that the contract in question violates the law, which if true requires the invalidation of the contract. MATC does not dispute that such a claim, if true, could be granted, but rather argues other procedural defects in the pleadings. None of those defects defeats this lawsuit.

I. MS. MARONE WAS NOT REQUIRED TO COMPLY WITH NOTICE OF CLAIM STATUTES

A. Notice of Claim Requirements Do Not Apply to Declaratory Actions Not Seeking Damages

MATC recognizes that Ms. Marone's two claims are for declaratory judgment. (MATC Br. 7.) Ms. Marone does not seek any form of damages against MATC, nor does she seek any penalty against MATC or any MATC official. She seeks a declaration that the labor contracts negotiated between MATC and Local 212 in violation of Act 10 are null and void under two distinct theories.

"The purpose of requiring notice is to make the municipality aware of the claim and afford it 'an opportunity to compromise and settle [the] claim without litigation.'" *Little Sissabagama Lake Shore Owners Assoc., Inc. v. Town of Edgewater*, 208 Wis. 2d 259, 265, 559 N.W.2d 914 (Ct. App. 1997), quoting *DNR v. City of Waukesha*, 184 Wis. 2d 178, 195, 515 N.W.2d 888 (1994). "The purpose of this statute is to protect the government and taxpayers from excessive claims by limiting the government's exposure to potential liability. Thus, *unless the government is exposed to liability*, the protections of § 893.80 are inapplicable." *Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 735, 530 N.W.2d 399 (Ct. App. 1995) (emphasis added).

Section 893.80 has two specific requirements: a notice of injury and a notice of claim. *See* § 893.80(1d)(a), (b). The purpose of the specific notice of *injury* requirement "is to notify the governmental entity of the potential claim so that it might investigate and evaluate." *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶10, 304 Wis. 2d 702, 738 N.W.2d 168. The purpose of the notice of *claim* requirement "is to afford the governmental entity an opportunity to effect compromise without suit, and to budget for settlement or litigation." *Id.* "These reasons apply to actions *seeking to impose liability* on a municipality" but

not, as held in the *Oak Creek* case, to actions seeking to hold municipalities to state law. *Id.*, ¶12 (emphasis added).

Logically, the notice of claim requirements are pointless when applied to declaratory judgment claims – particularly where, as here, what is being sought is not damages for a completed act but a declaration that a municipal action is unlawful. This is even clearer where, as here, the challenged action is entry into an unlawful contract that the municipality may not unilaterally reject. MATC has the ability and the authority to pay money to settle a damages claim, and to agree to take or not take any *discretionary* action to settle a claim for an injunction. It does *not* have the authority, however, to declare unlawful and void a contract, which is the claim for relief brought in this action. Only a court has that power. Nor does it have the authority to unilaterally cancel the contracts; if it did so, surely Local 212 would file suit to compel performance. MATC has no ability to "right the wrong" claimed here on its own. No local government entity has the authority to declare the validity or constitutionality of a contract, ordinance, or whatever it is the plaintiff is challenging. Thus, the notice provisions of § 893.80 serve no purpose here.

In fact, the Supreme Court of Wisconsin has expressly held that the *state* notice of claim statute, § 893.82 (which parallels the local government notice of claim statute, § 893.80) is <u>not</u> applicable to claims for declaratory relief. *Lewis v. Sullivan*, 188 Wis. 2d 157, 169, 524 N.W.2d 630 (1994). There is no reason to construe § 893.80 differently than § 893.82. To the extent that MATC would argue that *DNR v. City of Waukesha* compels a different result, this Court should look to what the supreme court, itself, thought about that subject. In *Lewis*, the supreme court distinguished *DNR v. City of Waukesha* on the basis that it was a damages case (not on the basis that § 893.82 was somehow different from § 893.80). *Id.* at fn. 9. The import of *Lewis* is that the notice of injury and notice of claim statutes are intended to protect the financial interests of the state and its subdivisions from damages actions and not from declaratory judgment actions where a citizen is seeking a declaration of his or her rights as against the state or one of its subdivisions.

By contrast, no case has expressly held that § 893.80 is applicable to all claims for declaratory relief. MATC claims that *Ecker Bros. v. Calumet County*, 2009 WI App 112, 321 Wis. 2d 51, 772 N.W.2d 240, held that "§ 893.80 applies to declaratory judgment actions" (MATC Br., 9), but that is not an accurate description of *Ecker*. In *Ecker*, the court of appeals

held only that "the statute applies to *this* declaratory judgment action." *Id.*, ¶5 (emphasis added). But the plaintiff in *Ecker* did not argue that the *declaratory judgment* statute provided an exception to § 893.80, it argued that the "alternate energy statutes [were] an exception to the notice statute." *Id.*, ¶6. The court of appeals held that those statutes, §§ 66.0401 and 66.0403, did not meet the three-part test for an exemption from the notice of claim statute. *Id.* It did *not* address whether the *declaratory judgment* statute, § 806.04, provided an exemption, as Ms. Marone argues here. Nor did the *Ecker* court explain its decision in light of *Lewis.*

Wisconsin courts have adopted a three-part test to determine whether a particular action avoids the § 893.80(1d) requirements altogether:[1] "1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; 2) whether enforcement of sub. (1)[2] would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and 3) whether the purposes for which sub. (1) was enacted would be furthered by requiring that a notice of claim be filed." *Oak Creek*, 2007 WI App 196, ¶7. The exceptions so recognized are numerous. In fact, as the Oak Creek court noted, ""the 'no action' command in § 893.80(1)(b) does not apply to many actions." *Id.*, ¶6.

First, the Wisconsin Legislature has created a statutory scheme governing claims for declaratory judgment. Section 806.04 creates that scheme and declares that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations *whether or not* further relief is or could be claimed." § 806.04(1) (emphasis added). The statute delineates who may bring a claim for declaratory relief, § 806.04(2), (4), (5), who must be named as parties, § 806.04(11), procedural rules, § 806.04(3), (7), (8), (9), (10), and explicitly is to be "liberally construed and administered" in order "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations," § 806.04(12). The statutory scheme provides citizens with the opportunity to protect their rights without having to seek and prove money damages. To seek relief before, rather than after, suffering harm.

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[1] *See generally Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶7, 265 Wis. 2d 422, 665 N.W.2d 379 (listing numerous statutes that provide claims not subject to § 893.80's requirements, despite § 893.80 by its terms applying to "all actions" and finding that condemnation appeals are also exempt); *see also Dixson v. Wis. Health Org. Ins. Corp.*, 2000 WI 95, 237 Wis. 2d 149, 612 N.W.2d 721 (not applicable to 3rd party complaints for contribution); *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, 304 Wis. 2d 702, 738 N.W.2d 168 (not applicable to a mandamus action to compel compliance with the direct legislation statute); *Kapischke v. County of Walworth*, 226 Wis. 2d 320, 595 N.W.2d 42 (Ct. App. 1999) (not applicable to certiorari actions of conditional use permit denials).

[2] In 2012, the legislature renumbered § 893.80(1) to § 893.80(1d). *See* 2011 Wis. Act 162. No changes were made to the language within that subsection. Case quotations referring to (1) have been left unaltered in this Brief.

Imputing the requirements of § 893.80(1d) onto declaratory judgment actions would place an obligation on parties wishing to challenge illegal government contracts which the legislature has chosen not to place on them under § 806.04. *See Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶24, 265 Wis. 2d 422, 665 N.W.2d 379 (declining to apply § 893.80(1d) "to appeals of condemnation awards under § 32.05(11)" because doing so "would place an obligation on landowners which the legislature has chosen not to place on them under § 32.05").

Second, slowing down an urgent declaratory judgment action with the notice of injury and claim procedures would hinder the legislature's preference for prompt resolution. As noted in *Little Sissabagama, supra*, compliance with § 893.80(1d) can force an aggrieved party "to wait as long as 240 days" before even commencing a lawsuit. 208 Wis. 2d at 266. That would hinder the legislature's stated purpose of permitting declaratory actions – to resolve "uncertainty and insecurity." *See* § 806.04(12).

This can also be seen in *Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W. 2d 587 (1996), in which the Wisconsin Supreme Court held that § 893.80 did not apply to a claim under the Open Meetings Law. In that case the Supreme Court said:

> Likewise, requiring a citizen to wait up to 120 days before bringing an enforcement action for an open meetings violation frustrates the purpose of that law. During this delay, the municipality could take significant action without public input or scrutiny of the process. Further, the statutory remedy of voiding governmental action taken at an illegal meeting under Wis.Stat. § 19.97(3) may in many cases become moot.

Id. at 595.[3]

This reasoning for this exception applies here in force because the public policy expressed by the supreme court also applies to Ms. Marone's claims in this case. The notice and waiting requirements of §893.80 would frustrate the purpose of the law and render many injunction cases against municipal misconduct effectively moot. It cannot be the law and it is not the law that MATC can blatantly violate Act 10 with a four-month long period of impunity.

But "hindering a legislative preference for 'promptness' is not the only way in which the requirements of Wis. Stat. § 893.80(1) might interfere with legislative purposes." *Nesbitt Farms*,

[3] While the Open Meeting and Open Records statutes now contain express statements that actions under them are not subject to § 893.80, they did not at the time *Auchinleck* was decided. *See* 1995 Wis. Act 158, §§ 5, 7 (creating §§ 19.37(1n) and 19.97(5).

2003 WI App 122, ¶13. "The inquiry is to determine whether some legislative goal, be it prompt resolution or another purpose, will be thwarted by requiring compliance with § 893.80(1) as a precondition to commencing an action under the statute." *Id.*

Applying § 893.80(1d) to declaratory judgment actions hinders other legislative goals of permitting such actions. Subsection 806.04(3) expressly permits a contract to "be construed either before or after there has been a breach thereof." Where the legality of a particular contract is questioned, a declaratory judgment action can be used to remove any uncertainty. Where the question concerns the legality of a government act or commitment that benefits some and harms others or which gives certain persons or entities (such as Local 212) certain rights and impairs those claimed by others (such as Ms. Marone), the affected local unit of government is unable to resolve that uncertainty by deciding to prefer the claims of one side over another. It lacks adjudicative power. Only a court may resolve the dispute.

Similarly, and to the same end, subsection 806.04(10) requires and permits various other parties to be named in declaratory judgment actions. If a plaintiff challenged the constitutionality of a city ordinance and the Attorney General wished "to be heard" in support of the challenge, the notice of claim requirements could prohibit him from doing so. If a plaintiff named an involuntary plaintiff who has an 'interest which would be affected by the declaration," how could that involuntary plaintiff supposed to comply with notice of claim requirements? The full purpose of the declaratory judgment statute cannot be realized if its procedures are shackled by § 893.80.

Third and finally, requiring a person seeking purely declaratory relief to follow the notice of claim procedures serves *none* of the purposes of that statute. Here, Ms. Marone is not "seeking to impose liability on" MATC, *see Oak Creek*, 2007 WI App 196, ¶12, nor is MATC "exposed to liability," *see Kettner*, 191 Wis. 2d at 735. She is not seeking to hold MATC liable to her for violating Act 10, she is seeking to nullify a contract, and MATC just happens to be a necessary party to do so. As stated in *Oak Creek*, the purposes of § 893.80 apply only to actions seeking to impose liability. As noted above, MATC had no power to grant her the relief she seeks, so it serves no purpose to require her to follow notice of injury and claim procedures.

Therefore, the three-part test is met, and this case can proceed without the plaintiff having followed the § 893.80(1d) procedures.

It is worth pointing out that on December 12, 2013, the Kenosha County Circuit Court, the Honorable David M. Bastianelli presiding, accepted the exact same argument made here – that § 893.80(1d) does not bar an action for a declaratory judgment[4] against a municipality – in another case challenging the legality of a contract under Act 10. The defendants in that case (like here, a union and a local education government unit) moved to dismiss, arguing that the plaintiffs had not followed notice of claim requirements. The judge ruled that § 893.80(1d) did not apply under the three-part test, because: (1) § 806.04 was a statutory scheme; (2) the legislative purpose of § 806.04 would be hindered by application of § 893.80(1d); and (3) § 893.80(1d)'s purposes were not furthered by requiring § 893.80(1d) to be followed in an action not seeking damages. *Lacroix v. Kenosha Unified School District*, Kenosha County Case No. 2013-CV-1899, December 12, 2013 Oral Ruling; *see* Kamenick Aff. Although the Kenosha County Circuit Court's ruling is not binding on this court, it is persuasive authority on which this Court may rely.

B. Even if Notice of Claim Requirements Do Apply, they Have Been Substantially Complied With

On February 16, 2013, Plaintiff's counsel sent a letter to MATC containing the following language:

> We would like to remind you – and the rest of the MATC Board – that as of this date there is no "window" for local units of government to ignore Act 10. The decision of Dane County Circuit Court Judge Colas in Case No. 11CV3774 has no effect outside of the parties involved in that one specific case. It has no precedential value and, in our view, is quite clearly wrong and almost certain to be reversed. Unions and government entities that negotiate contracts with terms that violate Act 10 run the risk of having those contracts declared unlawful.
>
> If the labor contract that you are voting on tonight does not conform to Wisconsin law as set forth in Act 10, the Board will be exposing MATC to litigation by taxpayers. For example, collective bargaining with general employee unions –and therefore a union contract - is unlawful unless it deals exclusively with base wages. Wage increases cannot be higher than the cost of living without approval via citizen referendum. In addition, Wisconsin statutes currently prohibit a defined pension plan for general public employees unless the employees contribute half of all contributions. If an employer offers a healthcare plan, the employees must pay at least 12% of the average cost of premiums.

[4] Judge Bastianelli also ruled that § 893.80 did not bar a claim for a preliminary injunction under § 813.02.

> Taxpayers must know that their tax dollars are being put to good use and in accordance with the law. That concern is especially salient considering the financial situation of MATC and, yet, MATC teachers are among the highest paid in the state. Therefore, if MATC renegotiates, reopens, or extends a union contract that violates Act 10, it does so at great risk of an immediate legal challenge. The Wisconsin Institute for Law and Liberty, as always, remains vigilant for any unit of government that does not follow the law.

Strict compliance with § 893.80(1d)(a) and (b) is not required; substantial compliance is sufficient to meet the goals of the statute. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 198, 515 N.W.2d 888 (1994). "[T]he written claim must be definite enough to fulfill the purpose of the claim statute – to provide the municipality with the information necessary to decide whether to settle the claim[, and t]he municipality must be furnished with sufficient information so that it can budget accordingly for either a settlement or litigation." *Id.* The letter above meets both parts of this test. It told MATC exactly what is necessary to "settle the claim" – do not approve the contracts or you will be sued. There was no claim for damages made, but it was clear that only abiding by Act 10 would resolve the dispute. In other words, MATC knew what was wanted: for them to abide by Act 10. It also provided sufficient information to allow MATC to "budget accordingly," knowing that there was no damages claim but they might have to defend a lawsuit challenging the legality of the contract.

It is not relevant that February 16, 2013 letter did not identify Plaintiff's counsel's client. The only identification requirements are that it need be "signed by the party, agent or attorney" and provide "the address of the claimant." The letter did both. MATC provides no reason why supplying the attorney's address would be insufficient. In the *Lacroix v. Kenosha Unified School District* case referenced above, Judge Bastianelli ruled that the naming of a claimant is not necessary for substantial compliance. *Lacroix v. Kenosha Unified School District*, Kenosha County Case No. 2013-CV-1899, December 12, 2013 Oral Ruling; *see* Kamenick Aff. Again, while not binding, this ruling is persuasive authority on which this Court can rely.

This is not a case where MATC needed to know who the individual claimant was so it could settle with that individual. When a municipality engages in an illegal act, it is subject to suit by any number of people that act might harm. The idea that MATC, knowing that it was about to violate one of the most contentious pieces of legislation in Wisconsin history – a bill that had prompted unprecedented protests and recall elections as well as drawing the support of

persons across the state and the country – was unaware that someone might care beggars belief. The idea that it would have acted differently had it known Ms. Marone's name and address is – there is no other word for it – silly.

And, after receiving actual notice of the claim, MATC rejected it. We made clear what relief we demanded – no collective bargaining beyond that permitted by Act 10. By entering into a collective bargaining agreement that is not compliant with Act 10, they effectively denied the claim. It is, in fact, difficult to see how they *could* now honor or compromise the claim; MATC has made a contractual commitment to the union. While we believe that contract is unlawful and void, we presume that the union does not. By entering into such an agreement, MATC has effectively cast its lot and surrendered its ability to honor the Plaintiff's claim without the acquiescence of the union. Only a court can undo their unlawful action.

C. Even if Notice of Claim Requirements Do Apply, It Is Not Necessary to Plead Compliance

Even if § 893.80 is applicable to this case, dismissal on the pleadings, as MATC seeks, is still inappropriate. Construing the predecessor to § 893.80, which likewise placed notice of injury and claim requirements on suits brought against units of local government, the Supreme Court of Wisconsin held that a complaint need not plead compliance with the notice of claim statute. *Rabe v. Outagamie County*, 72 Wis. 2d 492, 498, 241 N.W.2d 428 (1976) ("[C]ompliance with [the notice of claim statute] is a 'condition in fact requisite to liability,' but is not a condition required for stating a cause of action.") quoting *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 316-17, 159 N.W.2d 86 (1968). The cases cited by MATC on this issue were all decided on summary judgment. *See, e.g., E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶12, 335 Wis. 2d 720, 800 N.W.2d 421; *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶8, 302 Wis. 2d 358, 735 N.W.2d 30; *Thorp v. Town of Lebanon*, 2000 WI 60, ¶1, 235 Wis. 2d 610, 612 N.W.2d 59; *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 620 575 N.W.2d 712 (1998); *Ecker Bros. v. Calumet County*, 2009 WI App 112, ¶3, 321 Wis. 2d 51, 772 N.W.2d

240; *Moran v. Milwaukee County*, 2005 WI App 30, ¶1, 278 Wis. 2d 747, 693 N.W.2d 121; *Zinke v. Milwaukee Transp. Servs., Inc.*, 99 Wis. 2d 506, 507-08, 299 N.W.2d 600 (Ct. App. 1980).

No facts are before the court other than the allegations in the Complaint. Whether or not notice was given is a question of fact. *See E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶17, 335 Wis. 2d 720, 800 N.W.2d 421. On an incomplete record, it would be inappropriate to dismiss this case for allegedly failing to comply with § 893.80. Should this Court determine that § 893.80 applies, the Plaintiff deserves the chance to build a factual record and demonstrate compliance.

D. Local 212 Cannot Benefit from Notice of Claim Requirements

Whatever this Court decides with regard to MATC, another defendant remains in this lawsuit. On October 10, 2013, this Court granted Local 212 party status as an Intervenor-Defendant. Local 212 is a union, and is not any of the entities mentioned in § 893.80(1d). Local 212 did not join in MATC's Motion for judgment on the pleadings and did not file its own dispositive motion by the November 15, 2013 deadline. Therefore, Ms. Marone is not prohibited from proceeding against Local 212 by § 893.80, and this lawsuit may continue even if this Court dismisses MATC.

II. MARONE HAS STANDING TO BRING THIS LAWSUIT

MATC proffers a novel argument: that a party to a contract lacks standing to challenge it. That argument should be dismissed out of hand. Whether Act 10 was enacted to protect employees like Ms. Marone and whether Ms. Marone vicariously agreed to the contract are immaterial questions.

A. Ms. Marone Has a Legally Protectable Interest in the Legality of a Contract to which She Is a Party

The declaratory judgment statute could not be more clear: "Any person interested under a . . .written contract . . . or whose rights, status or other legal relations are affected by a . . . contract . . . , may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." § 806.04(2).

Ms. Marone has an interest in this contract, which affects her rights, status, and legal relations as an employee of MATC. Therefore, she has standing to bring a declaratory judgment action challenging its validity.

It is irrelevant whether Act 10 creates an additional legally protectable interest for Ms. Marone. The declaratory judgment statute creates a legally protectable interest for her and that is enough to establish standing. Surely the homicide statute does not create a legally protectable interest in those who commit murder, yet a killer-for-hire (or the person who hired him) can challenge the legality of a contract for a hit.

Yet Act 10 *does* create legally-protectable interests in municipal employers. Wis. Stat. § 111.70(2), for instance, contains a laundry list of statutory rights expressly granted to municipal employees, including the right to refrain from union activity and paying dues. Other portions of Act 10 impose legal status that employees can protect, such as being unrepresented in negotiations if "no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit." § 111.70(4)(d)3.b. Other parts of the law create protections for employees against certain employer and representative actions. *See* § 111.70(3)(a), (b); *see generally* § 111.07(2)(a) (permitting "any party in interest" to complain of unfair labor practices).

B. Ms. Marone's Union Membership Does Not Eliminate Her Right to Challenge the Legality of a Contract to which She Is a Party

Exactly what MATC is arguing is unclear. Neither of the two foreign cases it cites[5] have anything to do with standing (neither even mentions the word), yet MATC claims that under their holdings "Marone has no standing to sue MATC." (MATC Br. 12-13.) The holding of those two cases is that the members of an organization are *bound* by a contract negotiated by that organization on their behalf when certain conditions are met. *Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co.*, 828 F.2d 79, 84 (2nd Cir. 1987); *Moriarty v. Glueckert Funeral Home, Ltd.*, 925 F. Supp. 1389, 1393-94 (N.D. Ill. 1996).

That proposition is unremarkable, and Ms. Marone does not dispute it. Any lawful contract reached between a lawful collective bargaining agent and her employer binds her. In fact, under Wisconsin's collective bargaining laws, whether pre- or post-Act 10, a lawful contract negotiated and entered-into between a union and an employer binds even *non-members* to its performance. *See* Wis. Stat. § 111.70(4)(d).

But Ms. Marone is not arguing that she is not *bound* by the contract at issue (if it were lawful), she is arguing that it is *illegal*. She has certainly not delegated any authority to Local 212 to bargain illegally[6] – in this case, over any terms and conditions of employment other than base wages – with her employer. If its legality is upheld, she will be bound by it, whether she remains a member of Local 212 or not.

MATC appears to be arguing that a party that willingly, albeit vicariously, enters into a contract lacks standing to challenge the validity (or presumably, the construction) of that

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[5] *Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co.*, 828 F.2d 79 (2nd Cir. 1987); *Moriarty v. Glueckert Funeral Home, Ltd.*, 925 F. Supp. 1389 (N.D. Ill. 1996);

[6] MATC claims that "Act 10 does not make collective bargaining illegal; it limits the subjects upon which the parties may bargain." Act 10 affirmatively makes it illegal for the employer to bargain with a collective bargaining unit on "[a]ny factor or condition of employment except wages, which includes only total base wages and excludes any other compensation." Wis. Stat. § 111.70(4)(mb).

contract. If that were true, the only way a party could *ever* challenge the validity of a contract would be to argue it was entered into unwillingly, *e.g.*, under duress and none of the cases involving a party to a contract challenging it as illegal would exist.

MATC proffers no legal support whatsoever – much less precedential legal support from a Wisconsin court – for the proposition that a union member may not challenge the legality of a contract bargained between the member's union and employer. Even if that were the case, the pleadings alone do not establish satisfaction of the test MATC proposes. *Cf. Moriarty*, 925 F. Supp. at 1397 (denying cross motions for summary judgment due to the lack of facts in the record to establish "the conspicuousness and scope of [a union's] collective bargaining activities). The pleadings do not establish that "Local 212's 'principal, if not virtually sole activity' is to negotiate collective bargaining agreements on behalf of its members." (MATC Br. 14, quoting *New York Flame Proofing Co.*, 828 F.2d at 83.) Given that Act 10 eliminated the vast majority of public sector general employee unions' collective bargaining abilities, it is hard to see how that could be the case. Regardless, the very website MATC cites to reveals that Local 212 partakes in many other activities, and collective bargaining is not its "principal, if not virtually sole activity":

> Local 212 does much more than protect your wages, hours, working conditions, and rights under the contract. Our members are active in core committees which decide the direction of the school. We run the Educational Research & Dissemination (ER&D) program, which helps you become a better employee. Our members are involved in promoting progressive legislation to help students and the school. We also share MATC's commitment to educational excellence and work hard to make the institution a better place for all our students as well as faculty and staff.

http://local212.org/historymission.htm (last accessed December 13, 2013). Perusing the rest of Local 212's website reveals the organization engages in many other activities: holding listening sessions with local politicians, social events such as attending sporting events, blogging on

education topics, endorsing candidates, monitoring legislation, grievance services, air quality testing, and retiree services (including "friendships and social connections" and "opportunities for social activism and community service"). http://local212.org and internal pages (last accessed December 13, 2013).

At the very least, this issue would be more appropriately addressed in a summary judgment motion, not a motion to dismiss on the pleadings, because it requires factual development and discovery.

III. MARONE CAN RECOVER ATTORNEY FEES

A. Chapter 133 Does Not Clearly Bar Attorney Fees

"[A]n important purpose of fee-shifting statutes is to encourage injured parties to enforce their statutory rights when the cost of litigation, absent the fee-shifting provision, would discourage them from doing so." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶55, 303 Wis. 2d 258, 735 N.W.2d 93. "Providing for reasonable attorney fees and costs ensures that individuals will enforce the rights provided to them under the statute by the legislature, even when the costs of litigation exceed the value of the action." *Id.* "A cardinal rule in interpreting statutes is to favor a construction that will fulfill the purpose of the statute over a construction that defeats the manifest object of the act." *Id.*, ¶27.

Here, the "value" of this action to the Plaintiff, in monetary terms, is nil. She seeks no damages for injuries she has suffered. Therefore, the costs of litigation certainly exceed the "value" of this action, and the ambiguity in the fee-shifting rules of § 133.18 identified by MATC (*See* MATC Br. 15-16) should be resolved in favor of the purpose of those rules – ensuring that individuals like Ms. Marone can enforce the rights provided to them by the legislature.

Paragraph 133.18(1)(b) by its terms prohibits the recovery of any "damages, interest on damages, costs or attorney fees" from local government entities. Yet Subsection (6) of the same statute permits recovery against local government entities up to the cap listed in § 893.80(3) (currently $50,000). That Subsection would be superfluous if no recovery at all were permitted. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681

N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). The Supreme Court of Wisconsin recognized this conflict, although it failed to reconcile it, in *E-Z Roll Off*. 2011 WI 71, ¶28, n.13.

MATC argues that those two portions of the statute are not in conflict because plaintiffs can still recover "payments made on contracts" from local government entities. (MATC Br. 16.) But this construction only works if the term "damages" in § 133.18(1)(b) does not include payments made on contracts. But from time immemorial, recovery of funds paid under a contract have been considered "damages". *See, e.g.*, *Medbery v. Sweet*, 3 Pin. 210, 211 (1851) (discussing the "measure of damages" for breach of a contract). MATC's interpretation is illogical, and the ambiguity remains.

The legislature has declared that its intent is to have courts interpreted Chapter 133 "in a manner which gives *the most liberal construction* to achieve the aim of competition." § 133.01 (emphasis added). Between that clear declaration and the supreme court's instructions on interpreting fee-shifting statutes to fulfil their purpose, *Kolupar*, *supra*, the ambiguity here should be resolved in favor of permitting an attorney fee award in this case.[7]

B. MATC Cannot Benefit from Qualified Immunity in this Case

Qualified immunity for local government entities in Wisconsin is currently a purely statutory creation. Prior to 1962, a common law "immunity conferred upon municipalities derive[d], not from their sovereign status—for they have none—but from considerations of public policy." *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 374, 243 N.W.2d 422 (1976). In 1962, the Supreme Court of Wisconsin abrogated that immunity. *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). In its place, the legislature created a statutory immunity in the predecessor to § 893.80(4), which currently reads as follows:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi− legislative, judicial or quasi−judicial functions.

[7] At the very least, this is an issue that could be mooted by subsequent developments in the case, and could be considered at a later time by this Court after more thorough briefing.

Fatal to MATC's argument, Wisconsin courts have already expressly ruled that § 893.80(4) immunity does not serve as a bar to actions for declaratory judgment, such as this one. *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 224 Wis. 2d 269, 284-85, 592 N.W.2d 15 (Ct. App. 1998) ("[G]overnmental immunity does not apply to declaratory judgment actions."); *Schmeling v. Phelps*, 212 Wis. 2d 898, 914, 569 N.W.2d 784 (Ct. App. 1997) ("We conclude that a declaratory judgment action is not a 'suit ... brought against' Phelps or Dane County within the meaning of § 893.80(4)."). The *Schmeling* court recognized that the plaintiff sought neither money nor injunctive relief, and that the county and the county executive were only named so that they could "be heard on the question presented." 212 Wis. 2d at 914-15. Likewise here, Ms. Marone is seeking a declaratory judgment on the validity of a contract, and MATC is here because it is entitled to be heard on that question.

Furthermore, the portion of a claim for attorney fees is not itself a "suit" under § 893.80(4). It is merely one portion of a remedy available if the "suit" is successful. Either the suit itself is barred in its entirety or not, *see* § 893.80(4), as MATC acknowledges in its own brief: "The doctrine of qualified immunity provides immunity *from suit* rather than a defense to liability" (MATC Br. 18, citing *Barnhill v. Bd. of Regents of UW Sys.*, 166 Wis. 2d 395, 415, 479 N.W.2d 917 (1992)).

Regardless, even if qualified immunity could be applied in this way, it would avail MATC naught, for MATC had a clear duty to follow the strictures of Act 10. Act 10 expressly prohibits municipal employers from bargaining over the terms and conditions of employment other than base wages. § 111.70(4)(mb). Statutes enjoy a strong presumption of constitutionality. *In re Diana P.*, 2005 WI 32, ¶16. No court with jurisdiction over MATC (or Local 212) has ever held that § 111.70(4)(mb) or any other portion of Act 10 is unconstitutional. In fact, the only court whose opinions hold precedential effect over this geographic region held Act 10 to *be constitutional*, in its entirety, *before* this contract was entered into. *See WEAC v. Walker*, 705 F.3d 640 (7th Cir. Jan. 18, 2013). It is and has for a long time been the black-letter rule of law that circuit court decisions have no precedential effect and bind only the parties to that decision. *See 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) ("[A] circuit court decision is neither precedent nor authority"); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 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). .

Even if qualified immunity could be sought here, MATC had a ministerial duty to obey state statutes. Because it failed to do so, it has no immunity.

CONCLUSION

For the above reasons, MATC's Motion to Dismiss should be denied, and this Court should order briefing to resume on Ms. Marone's Motion for Summary Judgment.

Dated this 13th day of December, 2013.

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