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January 15, 2015

Via Hand Delivery
Mr. Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse, Room 1000
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 Mr. Esqueda:

Enclosed for filing is MMSD Defendants' Reply Brief in Support of Motion to Strike. A copy is being served on counsel by email today, together with a copy of this letter. Thank you.

Sincerely,

BOARDMAN & CLARK LLP

Sarah A. Zylstra

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

STATE OF WISCONSIN CIRCUIT COURT 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.

MMSD DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE

I. There is no merit to plaintiff's procedural arguments.

Blaska erroneously argues that the District's motion should be denied because: (1) it was "untimely" due to not being filed "before" the District's answer; (2) the District's brief did not expressly cite §802.06(6); and (3) the motion is a "disguised dispositive motion." Pl. Br. at 1-2. First, §802.06(6) permits the court to strike elements of a pleading "[u]pon motion made by a party before responding to a pleading." Here, the District made its motion to strike before its answer to the complaint: in Defendants' Motion to Strike, Answer and Affirmative Defenses, the motion to strike appears immediately before the District's answer. Thus, Blaska's argument is that the motion is untimely because it was not filed on a separate piece of paper from the answer. Nothing in §802.06(6) requires that the motion be filed separately. Placing the motion to strike directly before the answer in a single pleading meets the statutory requirement.

Moreover, Blaska points to no case law to support the proposition that the District's motion to strike should be denied on the basis of a failure to file it as a stand-alone pleading from

the answer, and there is no logical basis for such a result. Blaska does not supply any rhyme or reason for such overly technical treatment nor point to any prejudice that he suffers if the motion to strike appears directly before the answer in a single pleading. And, in any event, §802.06(6) permits the court to strike portions of pleadings "upon the court's own initiative at any time." Thus, even absent the District's motion, the court could grant the requested relief.

Blaska next objects that the District does not expressly cite §802.06(6) in its brief or identify the part of §802.06(6) on which it relies. This argument ignores that the District specifically cited §802.06(6) as the basis for the motion in its motion to strike, and the motion asserted that certain paragraphs of Blaska's complaint "are immaterial, impertinent and scandalous and warrant being stricken." Blaska cites no authority that the District must repeat itself for the court to consider its motion. Furthermore, Blaska understood the basis for the District's motion as he filed an "initial response" (before the court ordered this briefing schedule) in which he addressed the standing issues raised by the motion to strike. In addition, Blaska directly acknowledged the District's position in his brief. *See* Pl. Br. at 2 n.2.

Finally, Blaska attempts to recharacterize the District's motion to strike into something that it is not, arguing that it is really a motion to dismiss or a motion for summary judgment. A cursory review of Blaska's own cited case, *First Nat'l Bank v. Dickinson*, 103 Wis. 2d 428, 431-33, 308 N.W.2d 910 (Ct. App. 1981), is enough to dispatch this argument. *Dickinson* illustrates the difference between motions to dismiss and motions to strike: motions to dismiss seek dismissal of separate claims or causes of actions, whereas motions to strike seek dismissal of other matters that do not rise to a claim. *Id.* Here, Blaska has not separately alleged a cause of action for infringement of teachers' rights. Rather, he has pled two causes of action: (1) a claim for a declaration that the CBAs are unlawful and (2) a claim for an injunction to prevent

enforcement of the CBAs. As the teacher infringement paragraphs do not form a separate claim, a motion to strike is the proper procedural tool.[1] A motion to strike makes sense, as the District should not be compelled to submit to costly litigation over allegations that Blaska has no right to assert.

II. Blaska lacks taxpayer standing to litigate alleged infringements of teachers' rights.

Blaska acknowledges that his sole basis for standing is his status as a taxpayer. *See* Pl. Br. at 3. He fails, however, to put forward any arguments that support taxpayer standing in regard to his allegations of infringement of teachers' rights. In particular, he does not (and cannot) link those allegations to any actual injury suffered by taxpayers, which is a fundamental prerequisite for taxpayer standing. The allegations should therefore be stricken.

The District does not challenge that taxpayer standing exists in certain instances, and it acknowledges as much in its initial brief. *See* Defs. Br. at 6-7. The District does, however, challenge Blaska's characterization of taxpayer standing as providing him, based on his status as a taxpayer, with the right to litigate allegations of infringement of teachers' rights.

To begin, Blaska correctly recognizes the District's argument that taxpayer standing to assert interests of teachers is precluded by the lack of any connection between the allegations regarding infringement of teachers' rights and an actual injury to taxpayers. *See* Pl. Br. at 6. He contends, however, that there is no legal support for this argument. Not so. This argument is well supported by the basic law of standing. Just as it is indisputable that Wisconsin has recognized taxpayer standing in certain cases, it is also indisputable that taxpayers do not have standing in all cases. *See, e.g.*, *Lake Country v. Hartland*, 2002 WI App 301, ¶20, 259 Wis. 2d 107, 655 N.W.2d 189 ("mere status as a taxpayer" not "sufficient to confer standing *in all instances*"); *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶10 (taxpayer does not

[1] This also explains why the motion is not for summary judgment (in addition to it being based on the pleadings).

have standing "merely because he or she disagrees with the legislative body"). It is well established that a taxpayer does not have standing to maintain a claim based on allegations that do not establish that taxpayers, as a class, have suffered an actual injury. *See, e.g., Berger v. City of Superior*, 166 Wis. 477, 479-80, 166 N.W. 36 (1918) (standing contingent on "loss to the general taxpayers"); *Village of Slinger*, 2002 WI App 187, ¶12 ("The law requires at least an allegation of pecuniary loss or injury."); *see also Milwaukee Horse v. Hill*, 207 Wis. 420, 427-28, 241 N.W. 364 (1932) (internal quotes omitted) ("The taxpayer himself is the actual party to the litigation, and represents not the whole public, nor the state, nor even all the inhabitants of his municipality, but a comparatively limited class, namely, the citizens who pay taxes.").

A precondition to taxpayer standing, therefore, is that the taxpayer has suffered "a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988). This is consistent with the broader principle that standing requires "a personal stake in the outcome of the controversy." *Chenequa Land Conservancy v. Village of Hartland*, 2004 WI App 144, ¶17, 275 Wis. 2d 533, 685 N.W.2d 573. Moreover, this basic requirement for taxpayer standing is acknowledged even in the cases that Blaska cites. *See Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993) (quoting *S.D. Realty Co. v. Sewerage Commission*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961)) ("'In order to maintain a taxpayers' action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss.'").

Blaska's allegations regarding infringement of teachers' rights do not meet this basic requirement. They establish only that he disagrees with how the CBAs will allegedly impact

teachers' rights—not any injury to taxpayers. This is not enough to confer standing. *Lake Country*, 2002 WI App 301, ¶23 ("simply registering . . . disagreement" inadequate for standing).

In his brief, Blaska attempts to sidestep this deficiency by relying on allegations in his complaint that are related to other contract provisions. *See* Pl. Br. at 7. Specifically, Blaska cites allegations in paragraphs 39 and 40 of his complaint and asserts that "[t]hese allegations establish that taxpayers are harmed by the CBAs, including the aspects of the CBAs which infringe on the rights of teachers." Pl. Br. at 7.[2] First, the District's motion does not seek to strike allegations in paragraphs 39 and 40. Second, and more importantly, the allegations in paragraphs 39 and 40 do not allege facts showing a link between the alleged infringement of teachers' rights and any expenditure of taxpayer money by the District.

The allegations that are subject to the District's motion to strike relate to the right of teachers to refrain from union activity, not pay union dues, and not pay any amount under any "fair-share" agreements. *See* Defs. Br. at 1. As explained in the District's initial brief, because each of these allegations by definition relates only to actions or payments that will be made by ***teachers***, none of them will result in any expenditures by the District. *See id.* at 7-8. As discussed above, this precludes taxpayer standing in regard to these allegations. And Blaska's allegations in paragraphs 39 and 40 do not change this, as they do not link the alleged infringement of teachers' rights to any expenditure of taxpayer funds by the District:

- Paragraph 39 includes a general allegation that the CBAs will require the expenditure of tax money; it does not link any expenditures to the alleged infringement of teachers' rights.
- Paragraph 40 alleges that administration of the CBAs, including the administration of dues deductions for MTI, will result in the expenditure of public funds, but this relates to actions that will allegedly be taken by the District under the CBAs. Those actions are distinct from any actions that might be taken by teachers (e.g., engaging in union activity or paying union dues or amounts under fair-share agreements).

[2] Blaska also cites paragraph 41, which is subject to the motion to strike and addressed separately later in this brief.

In sum, Blaska cannot establish the actual injury necessary to support taxpayer standing for his allegations regarding infringement of teachers' rights by attempting to link those allegations to unrelated allegations in his complaint, which are not subject to the District's motion to strike.

In essence, Blaska is attempting bootstrap his teachers' rights allegations that are subject to the District's motion to other allegations not subject to the motion. But Blaska cites no authority for the proposition that this is permissible. Moreover, permitting Blaska to move forward in this manner would be contrary to the well-established principle that taxpayer standing is premised on an actual injury to taxpayers. Simply because Blaska may have standing to assert some issues alleged in his complaint[3] does not mean that he has standing in regard to *every* allegation. 59 Am. Jur. 2d § 28 (2012) ("A party may have standing to bring some claims but not others."); *see, e.g.*, *Town of Baraboo v. Village of West Baraboo*, 2005 WI App 96, ¶31, 283 Wis. 2d 479, 699 N.W.2d 610 (dismissing one of several claims for lack of standing). A contrary rule simply would not make sense. If Blaska lacks standing to bring a lawsuit based solely on his teachers' rights allegations, why should he be permitted to litigate those allegations in this lawsuit?

In addition, Blaska's allegations regarding the alleged infringement of teachers' rights fail to establish taxpayer standing under applicable pleading standards. Blaska argues that, for purposes of this motion, the court must accept as true the allegations in the complaint. He specifically cites paragraphs 39 and 40 (as well as 41, which is addressed later) and argues that those paragraphs are sufficient to support standing for his allegations regarding infringement of teachers' rights. While the court does accept well-pleaded facts as true, Blaska ignores the

[3] While the District is accepting as true that Blaska has taxpayer standing for other allegations in the complaint for purposes of this motion, it is not conceding that Blaska has such standing for purposes other than this motion.

recent clarification to Wisconsin's pleading standards, which must be applied here. Under those standards, Blaska's teachers' rights allegations fall well short of establishing taxpayer standing.

First, as Blaska's own cited case makes clear, motions to dismiss and motions to strike adhere to the same legal standards. *See First Nat'l Bank*, 103 Wis. 2d at 431-33. Second, the Wisconsin Supreme Court has recently clarified Wisconsin's pleading requirements in *Data Key Partners v. Permira Advisors*, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693. In that case, the court closely analyzed what a plaintiff must do to plead facts sufficient to show entitlement to relief, adopting the standard from one of the leading cases on federal pleading, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Data Key Partners*, 2014 WI 86, ¶22. Following *Twombly*, *Data Key Partners* held that under Wisconsin law, as under federal law, allegations in a complaint must *plausibly* show that the plaintiff is entitled to relief; allegations that are merely consistent with a potential violation are insufficient. *Id.* ¶26. This represents a departure from past precedent that suggested a complaint should not be dismissed unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim. *Id.* ¶28. *Data Key Partners* emphasized that pleading legal conclusions, as opposed to facts, is not sufficient, and that it is therefore important to distinguish between the two. *Id.* ¶18. The court explained that sufficiency of a complaint depends upon the substantive law underlying the claim, and it may be necessary to plead more facts to sustain a complaint. *Id.* ¶31.

Here, Blaska's allegations relating to infringement of teachers' rights are insufficient because they allege legal conclusions that are untethered to his standing as a taxpayer without alleging facts plausibly suggesting that he is entitled to the relief he seeks. Blaska artfully ignores the specific paragraphs that the District seeks to strike and instead sets up a strawman argument and commingles the issue presented. He points to paragraphs 39 and 40 of his

complaint, which allege that the CBAs require the expenditure of tax monies and "the school district must expend money to administer the CBAs, including but not limited to, administering the dues deductions for MTI." *Id.* ¶¶39-40. On their face, those paragraphs arguably allege taxpayer harm. But, again, the District has not moved to strike them.

At issue are paragraphs 1(c), 11, 28, 33, 41, and portions of paragraph 25, which assert infringement of teachers' rights separate and distinct from any taxpayer issue. For example, paragraph 1(c) asserts "the CBAs violate the rights of teachers under Wis. Stat. §111.70(2)." Paragraph 11 asserts "Pursuant to Act 10, teachers have the right, among other things, to (a) refrain from union activity, (b) not pay union dues, and (c) not pay any amount under any so-called "fair share" agreements, i.e. non-union teachers being forced to pay union dues against their wishes." These paragraphs are legal conclusions, which are insufficient to state a claim under *Data Key Partners*. Further, even if Blaska could overcome that hurdle, he makes only general allegations and does not allege facts that *plausibly* tie his teachers' rights allegations to any alleged illegal expenditure of funds. Whether a teacher does or does not have a right to refrain from union activity has no bearing on Blaska as a taxpayer. Blaska's teacher infringement allegations therefore do not meet the requirements of *Data Key Partners*.

Finally, the taxpayer standing cases that Blaska cites in opposition to the District's motion—*S.D. Realty*, *Hart*, *Bechthold*, and *Wagner*—do not establish that he has standing to litigate the alleged infringement of teachers' rights. While each of these cases found taxpayer standing in regard to a taxpayer challenge to a governmental contract, all of them are distinguishable because the challenge asserted in each case was directly linked to the expenditure of funds that provided the basis for taxpayer standing. Both *Wagner* and *Bechthold* involved challenges to contracts based on an argument that the governmental entity in the case had failed

to follow proper bidding procedures when securing the contract. *Bechthold v. City of Wauwatosa*, 228 Wis. 544, 562, 280 N.W. 320 (1938); *Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207 (1928). The bidding of contracts by its nature impacts the costs to the governmental entity and taxpayers. Similarly, in *Hart* and *S.D. Realty Co.* the plaintiffs argued that the governmental body did not have authority to enter into the contracts, and therefore, the expenditure of taxpayer funds under the contracts was illegal. *Hart*, 176 Wis. 2d at 696; *S.D. Realty Co. v. Sewerage Comm.*, 15 Wis. 2d at 21. Thus, there was a direct link in these cases between the plaintiffs' theory of standing and plaintiffs' taxpayer status.

Here, in contrast, there is no link between Blaska's allegations regarding infringement of teachers' rights and his taxpayer status or any payment of taxpayer funds. The harm (if any) related to the alleged infringement of teachers' rights will be suffered by teachers, not taxpayers. Thus, these allegations are not the same as the allegations in *S.D. Realty*, *Hart*, *Bechthold*, and *Wagner*. Again, even if Blaska's allegations are true, the result would not be the illegal expenditure of public funds, and if there were any injury, ***teachers***, not taxpayers, would be the injured party (i.e., teachers, not taxpayers, are affected by the right to refrain from union activity; teachers, not taxpayers, would be allegedly forced to pay union dues against their wishes; and teachers, not taxpayers, would be allegedly required to make fair-share payments). None of Blaska's cases support taxpayer standing to challenge aspects of a governmental contract that do not injure taxpayers.

Blaska also cites *Hart* for the proposition that allegations regarding potential future harm (i.e., the threat of future teacher lawsuits alleged in paragraph 41 of his complaint) are sufficient to support taxpayer standing. Pl. Br. at 8. But this is not the law in Wisconsin. As explained in the District's opening brief, "remote" or "hypothetical" injury will not support standing. Defs.

Br. at 8 (citing *Fox v. DHSS*, 112 Wis. 2d 514, 334 N.W.2d 532 (1983)). *Hart* does not hold to the contrary. *Hart* involved a taxpayer challenge to Milwaukee County's transfer of the operation and management of the Milwaukee County Public Museum to a non-profit corporation. 176 Wis. 2d 694, 696, 500 N.W.2d 312 (1993). Defendants challenged plaintiffs' standing to bring the suit, arguing that, as a matter of law, taxpayers were not injured by the transfer because the pleadings indicated that the transfer would decrease operational costs for the County. *Id.* at 698-99. The court rejected this argument, concluding that the decrease did "not conclusively indicate that the challenged transaction will result in tax savings to county taxpayers." *Id.* at 700. The court noted that taxpayers could still suffer injury, such as a reduction in the quality of services, despite a decrease in costs. *Id.* The court did not hold that a "remote" or "hypothetical" injury is sufficient to provide standing. Rather, it held that the allegations in the complaint were not necessarily inconsistent with an injury to taxpayers.[4]

Here, in contrast, the type of injury that Blaska asserts—potential future lawsuits brought by teachers—is unquestionably too remote and hypothetical to support standing. Blaska makes no plausible allegations that these lawsuits will ever be filed.[5] And, as discussed in the District's initial brief, Wisconsin law requires an actual injury to support standing.[6] Defs. Br., at 8-9.

In sum, because plaintiff does not allege facts to show actual injury to taxpayers from the alleged infringement of teachers' rights, those allegations are immaterial and should be stricken.

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[4] *Hart* likely would have been decided differently today under *Data Key Partners*' plausibility standard.

[5] Blaska objects that the District's argument that no teacher has sued the District is not a fact in record, but this criticism misses the mark. He has not alleged any actual lawsuits, and his own complaint reinforces that no suit has been brought as it specifically alleges only ***exposure*** to suit, not an actual suit. *See* Compl., ¶41.

[6] Blaska criticizes the District's reliance on federal cases on this point, but Wisconsin courts routinely look to federal cases as guidance on standing, including specifically the actual injury requirement. *See, e.g., Foley-Ciccantelli v. Bishop's Grove*, 2011 WI 36, ¶46 n.23, 333 Wis. 2d 402, 797 N.W.2d 789; *First Nat'l v. M&I*, 95 Wis. 2d 303, 307-09, 290 N.W.2d 321.

Dated this 15th day of January, 2015.

BOARDMAN & CLARK LLP
By

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