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June 1, 2015

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

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

Dear Judge Niess:

Enclosed is the Response of MMSD Defendants to Blaska's Motion for Summary Judgment. A copy is being served on counsel of record by email today, together with a copy of this letter. Thank you.

Very truly yours,

BOARDMAN & CLARK LLP

Sarah A. Zylstra

SAZ/ms
Enclosure
cc: Attorney Richard M. Esenberg (*via email*)
Attorney Brian McGrath (*via email*)
Attorney Stacy Stueck (*via email*)
Attorney Lester A. Pines (*via email*)
Attorney Tamara B. Packard (*via email*)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

DAVID BLASKA,

Plaintiff,

v.

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

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

Defendants.

RESPONSE OF MMSD DEFENDANTS TO BLASKA'S MOTION FOR SUMMARY JUDGMENT

Introduction

There is a dispute of law in this case, but this dispute is resolved by the straightforward application of binding Wisconsin precedent. As the Madison Metropolitan School District (the "District") and the Madison Metropolitan School District Board of Education (the "Board") (collectively, "MMSD") explained in their May 1, 2015 Motion for Summary Judgment and Memorandum in Support ("MMSD Br." or "Summary Judgment Brief"), *Slabosheske v. Chikowske*, 273 Wis. 144, 150, 77 N.W.2d 497 (1956) and its progeny establish that MMSD and MTI were entitled to rely on the final Decision and Order issued by Judge Juan B. Colás in *MTI v. Walker* to enter into the CBAs, and, because the CBAs were entered into in reliance on the final order of a circuit court, they are entitled to their effect, even though that order was later reversed.

Yet, rather than address this controlling authority, Blaska asserts an entitlement to summary judgment based on tenuous analogies, inapplicable legal theories, and by citing irrelevant facts related to other Act 10 litigation that did not involve MMSD or MTI. Blaska disregards the fact that portions of Act 10 were not "in effect" for MMSD and MTI until July 31, 2014, the date of the Wisconsin Supreme Court's decision overturning Judge Colás's Order. Blaska also ignores that Act 10 was never intended to be in effect for all municipal employees on the effective date of the Act because the legislature designed the Act to be phased in as collective bargaining agreements expired or terminated. Therefore, in this case, where the CBAs were negotiated and executed before Act 10 became effective for MMSD and MTI, Act 10 requires that the CBAs stay in effect until their date of expiration. Blaska's analogies and inapplicable legal theories do not provide a legal basis for the relief he seeks and his motion for summary judgment should therefore be denied.

Moreover, while MMSD's legal authority supports summary judgment for the defendants, Blaska's summary judgment motion faces the obstacle of a dispute of fact because Blaska has failed to put forward sufficient admissible evidence to establish that (1) he is a taxpayer who (2) has suffered an injury sufficient to confer taxpayer standing. As such, his motion for summary judgment should be denied, summary judgment should be entered in favor of the defendants, and Blaska's complaint should be dismissed with prejudice.

Response to Claims

A. Declaratory Judgment. MMSD disputes that "[a]n analysis of the elements is unnecessary to decide [Blaska's declaratory judgment] claim." Pl. Br. at 3. To maintain this claim as a "taxpayer," Blaska has the burden to establish all of the following elements:

1. The existence of a controversy in which a claim of right is asserted against one who has an interest in contesting it.
2. The controversy must be between persons whose interests are adverse.
3. The party seeking declaratory relief must have a legally protectable interest in the controversy, which means that the party must establish that he:
    i. Has personal stake in the outcome;
    ii. Is directly affected by the issues in controversy; and
    iii. Has sustained, or will sustain, pecuniary loss as a taxpayer sufficient to establish standing.
4. The issue involved in the controversy is ripe for judicial determination.

Village of Slinger v. City of Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81. As discussed in MMSD's Summary Judgment Brief, Blaska cannot establish the third element. MMSD Br. at 23-28. In addition, for the reasons discussed in that brief and as also discussed below, Blaska cannot establish a basis for a declaratory judgment that the CBAs are void.

B. Temporary Injunction. MMSD disputes Blaska's proposed elements for this claim. A temporary injunction is "not to be issued lightly," and is appropriate only where the cause is "substantial" and the movant has established the following elements:

1. That future conduct of the defendant will violate a right of and injure the movant.
2. Lack of an adequate remedy at law.
3. That the movant will suffer irreparable harm if the injunction is not issued (for a temporary injunction, irreparable harm requires proof that, without it to preserve the status quo, the permanent injunction sought would be rendered futile).
4. That, on balance, equity favors issuing the injunction.

Pure Milk Products Coop., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519-20, 259 N.W.2d 310 (1977).

Blaska has not (and cannot) establish ***any*** of the elements required for a temporary injunction.

C. Permanent Injunction. MMSD disputes Blaska's proposed elements for a permanent injunction. A permanent injunction is "not to be issued lightly," and is appropriate only where the cause is "substantial" and the movant has established the following elements:

1. A reasonable probability of ultimate success on the merits.
2. Lack of an adequate remedy at law.
3. That the movant will suffer irreparable harm if the injunction is not granted.
4. That, on balance, equity favors issuing the injunction.

Pure Milk Products Coop., 90 Wis. 2d at 800.

Blaska has not (and cannot) establish ***any*** of the elements required for a permanent injunction.

D. Defenses. MMSD incorporates by reference the defenses set forth in its Summary Judgment Brief.

Response to Proposed Undisputed Facts

1. No dispute.

2. Dispute. This proposed fact is not supported by admissible evidence. In support of the proposed fact, Blaska cites the Complaint and the Answers. However, in their Answers, neither MMSD nor MTI admitted that Blaska is a resident of the City of Madison or that he is a taxpayer whose taxes are used to fund the District. Rather, all Defendants denied these

allegations and put Blaska to his proof. *See* MMSD Answer ¶ 3; MTI Answer ¶ 3. He has failed in such proof.

3. No dispute.

4. Dispute. This is an issue of law. MMSD disputes Blaska's characterization that "Act 10 became law in Wisconsin on June 29, 2011; Act 32 on July 1, 2011." MMSD does not dispute that these are the effective dates of the two Acts (see MMSD PUF ¶ 2), but for the reasons discussed herein and in its Summary Judgment Brief, MMSD disputes that Act 10 and Act 32 were "in effect" as to MMSD and MTI for the period beginning on September 14, 2012 (when Judge Colás issued his Decision and Order in *MTI v. Walker*) until July 31, 2014 (when the Wisconsin Supreme Court overturned Judge Colás's Order).

5. No dispute. *But see* Response to Pl. PUF ¶ 4.

6. No dispute.

7. No dispute.

8. No dispute.

9. No dispute.

10. No dispute.

11. No dispute.

12. No dispute.

13. No dispute.

14. No dispute.

15. No dispute.

16. No dispute.

17. Dispute. This proposed fact is not supported by admissible evidence. In support of the proposed fact, Blaska cites McGrath Aff. ¶ 4, Ex. 3. Paragraph 4 of the McGrath Affidavit states that Mr. McGrath, Blaska's attorney, attached to his affidavit as Exhibit 3 "an excerpt of the expenses contained in the District's preliminary budget for the 2014-2015 school year which I printed from the District's website." Mr. McGrath also avers that this preliminary budget "contains the most up to date information on the 2013-2014 year," and he makes statements regarding calculations regarding "expenses for salaries and benefits" that are presumably based on the information contained in the attached Exhibit 3. Mr. McGrath's affidavit does not, however, contain any foundation establishing that Mr. McGrath has any personal knowledge of the factual assertions made in paragraph 4 of his affidavit. Nor does his affidavit establish any foundation to authenticate Exhibit 3 and the documents are hearsay. Consequently, he has failed to present admissible evidence to support this proposed fact.

18. No dispute.

19. No dispute.

Argument

Blaska makes two primary arguments for summary judgment. His first is a "clairvoyance" argument, asserting that even though Judge Colás issued a final Decision and Order (the "Order") in *MTI v. Walker* holding that portions of Act 10 violated the Wisconsin and United States Constitutions on their face and were therefore "null and void" and "without effect," there was other Act 10 litigation that did not involve MTI or MMSD that MTI and MMSD should have followed instead because they should have known that those decisions, instead of Judge Colás's would be affirmed. That argument completely ignores the fact that the

Order was entitled to its effect and all actions taken by MTI and MMSD in reliance on the Order are protected and entitled to their effect.

Blaska's second line of argument fares no better. Again ignoring the law that actually governs this dispute, Blaska takes a "square-peg-in-a-round-hole" approach by drawing tenuous analogies to inapplicable law. For example, Blaska relies heavily on a case that addresses the effect of a court's overruling a common law rule and a case analyzing an insurer's contractual duty to defend an insured — neither of which are applicable to this dispute. And underlying his entire case is the false premise that the relevant portions of Act 10 were "in effect" as of June 29, 2011. To the contrary, those provisions did not apply to these defendants until July 31, 2014, and the collective bargaining agreements reached between them prior to that date are valid until they expire.

Further, apart from the failure of his legal theories, Blaska has also failed to present admissible evidence necessary to establish several elements of his claims, and has failed to meet his burden to establish the elements necessary for injunctive relief. As such, Blaska's motion for summary judgment should be denied, MMSD's motion for summary judgment should be granted, and Blaska's complaint should be dismissed with prejudice.

I. SUMMARY JUDGMENT STANDARD.

The summary judgment standard is outlined in detail in MMSD's Summary Judgment Brief, and it is not necessary to repeat that discussion here other than to highlight one key point: In moving for summary judgment, Blaska has the burden to come forward with admissible evidence to support his claims — hearsay, opinion, speculation, or conclusory allegations cannot provide a basis for summary judgment. *Moulas v. PBC Productions, Inc.*, 213 Wis. 2d 406, 417,

570 N.W.2d 739 (Ct. App. 1997); *Transportation Ins. Co. v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 289-90, 507 N.W.2d 136 (Ct. App. 1993). Blaska has not met this burden.

II. MMSD AND MTI WERE ENTITLED TO RELY ON JUDGE COLÁS'S ORDER IN *MTI V. WALKER*.

Blaska makes several arguments asserting that MMSD and MTI were not entitled to rely on Judge Colás's Order in *MTI v. Walker*. These arguments ignore the controlling Wisconsin law on the issue. Furthermore, the authority that Blaska does cite is not applicable to this case.

A. *Slabosheske* and its progeny control this case.

Blaska does not address *Slabosheske v. Chikowske*, 273 Wis. 144, 77 N.W.2d 497 (1956), but MMSD's Summary Judgment Brief addresses in detail why *Slabosheske*, which is binding authority, controls this case and requires that summary judgment be awarded in favor of MMSD. *See* MMSD Br. at 11-16. MMSD incorporates that argument here.

As explained more fully in MMSD's Summary Judgment Brief, the Wisconsin Supreme Court held in *Slabosheske* that a final order of a circuit court is entitled to its effect unless and until it is reversed. Moreover, it established that agreements reached between a party and a third party in privity with that party in reliance on a final order prior to its reversal are protected and also entitled to their effect, even if they create obligations that last beyond the date of reversal. Here, Judge Colás's Order held that the provisions of Act 10 on which Blaska's Complaint rests were "null and void" and "without effect." MMSD Br. at 5, PUF ¶¶ 6-7. Consequently, until the Order was reversed, those portions of Act 10 had no "legal effect or existence." *Hunter v. School District of Gale-Ettrick-Trempealeau*, 97 Wis. 2d 435, 444, 293 N.W.2d 515 (1980); *Slabosheske*, 273 Wis. at 150. That is true despite the fact that the Order was appealed (as the Order was not stayed pending appeal). *Slabosheske*, 273 Wis. at 150.

Further, as in *Slabosheske*, MTI and MMSD, acting in reliance on the Order, were "protected by the circuit court judgment." *Id.* Thus, MTI, the party in whose favor the Order was issued, and MMSD, with whom MTI bargained and contracted, were entitled rely on the Order to collectively bargain and enter into the CBAs until and unless the Order was reversed. And, as in *Slabosheske*, even after the Order was reversed, the actions of MTI and MMSD taken in reliance on it prior to reversal are entitled to their effect. *Id.* at 157.

B. Even if MMSD were a non-party, MMSD was entitled to rely on Judge Colás's Order in *MTI v. Walker*.

Blaska argues that MMSD cannot rely on Judge Colás's Order in *MTI v. Walker* because MMSD was not a party to that suit and even if MMSD were, two Court of Appeals cases — *Kuhn* and *Raasch* — indicate that MMSD could not rely on the circuit court's order. Blaska is incorrect for several reasons.

First, *Slabosheske* squarely refutes the argument that a non-party who entered into a contract with a party cannot rely on the court's decision. *Slabosheske* itself involved the enforceability of an agreement between a party and a non-party following reversal of a circuit court ruling on which the agreement was premised. The Wisconsin Supreme Court upheld the ongoing validity of that agreement, even post-reversal. *Slabosheske*, 273 Wis. at 157. The facts are exactly the same here. Further, MTI ***was*** a party and MMSD is the ***only*** entity with whom MTI bargains. The Order gave MTI the ability to bargain without the constraints in Act 10 that Judge Colás found unconstitutional. That, by definition, means bargaining and entering into collective bargaining agreements with MMSD.

Second, neither of Blaska's two cases — *Kuhn* and *Raasch* — are on point. He cites both of them for the uncontroversial proposition that circuit court decisions are not precedential. *See Raasch v. City of Milwaukee*, 2008 WI App 54, ¶ 8, 310 Wis. 2d 230, 750 N.W.2d 492; *Kuhn v.*

Allstate Ins. Co., 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993). But MMSD does not cite Judge Colás's Order as ***precedent***; it is not suggesting that ***another court*** is bound to follow that Order in resolving a similar dispute to that resolved by Judge Colás's Order. *See, e.g.*, *Black's Law Dictionary* 1176 (6th ed. 1990) (defining precedent as "[an] adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law...."). Rather, MMSD's reliance on the Order is based on another uncontroversial tenant of Wisconsin law: that because the circuit court had jurisdiction and duty to decide the constitutional questions before it, its Order bound the parties before it, and until the Order was reversed, it was a valid and enforceable judgment on which MMSD and MTI were entitled to rely. *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 1466 N.W.2d 861 (1991); *Just v. Marienette County,* 56 Wis. 2d 7, 26, 201 N.W.2d 761 (1972); *Slabosheske*, 273 Wis. at 150; *see also Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998) ("A voidable judgment, on the other hand, has the same effect and force as a valid judgment until it has been set aside."). Blaska's precedent argument misses the mark.

C. MMSD's reliance on Judge Colás's Order did not violate the rights of taxpayers.

Blaska next makes an undeveloped and completely circular argument. He asserts that MMSD cannot rely on Judge Colás's Order because doing so would violate the rights of taxpayers who were not party to *MTI v. Walker*. Setting aside the fact that this argument presumes that the rights of taxpayers have been violated — which is one of the central disputes in this litigation — Blaska's argument has already been flatly (and repeatedly) rejected by the Wisconsin Supreme Court:

> This court has determined that the Declaratory Judgment Act does not require the joinder as parties, in a declaratory action to determine the validity of a statute or

> ordinance, of any persons other than the public officers charged with the enforcement of the challenged statute or ordinance. We have not construed Wis. Stat. § 806.04(11) to require that where a declaratory judgment as to the validity of a statute or ordinance is sought, every person whose interests are affected by the statute or ordinance must be made a party to the action. If the statute were so construed, the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly affect the interests of large numbers of people.

Helgeland v. Wisconsin, 2008 WI 9, ¶ 140, 307 Wis. 2d 1, 745 N.W.2d 1 (citations and internal quotation marks omitted). A contrary rule would mean that all Wisconsin taxpayers would need to be joined to every circuit court action challenging a legislative enactment or governmental action. That is not the law.

D. Other Act 10 litigation is irrelevant.

Citing several nonbinding court decisions rejecting other challenges to Act 10, Blaska argues that MMSD and MTI should have predicted the future and determined that Judge Colás's Order would eventually be reversed and therefore should not have acted on that Order in negotiating and reaching the CBAs. Blaska asserts that MMSD and MTI "decided to cherry pick" by relying on Judge Colás's Order rather than relying on decisions in other Act 10 litigation that were not binding on either party, and that because they must have been aware of these other cases, they did this "at their own risk." Pl. Br. at 11. Blaska's argument is illogical.

"Cherry picking" implies that the parties to *MTI v. Walker* and MMSD had a "choice" to disregard Judge Colás's declaration of unconstitutionality. Not so. Had MMSD "chosen" to disregard Judge Colás's Order and refused to bargain with MTI, MTI could have brought a prohibited practice complaint against MMSD at the Wisconsin Employment Relations Commission. The Commissioners, as the "public officers charged with the enforcement of the challenged statute," *Helgeland*, 2008 WI 9, ¶ 140, were named parties in *MTI v. Walker* and thus there can be no argument that they were not bound by the Order. Thus, had the issue come to the

WERC, it would have been bound to follow the law as it had been declared by Judge Colás — that certain provisions of Act 10 were "null and void" and "without effect" — and therefore to find that MMSD had to bargain with MTI as though those provisions were never enacted. *See Madison Teachers, Inc. v. Madison Metropolitan School District*, 197 Wis. 2d 731, 541 N.W.2d 786 (Ct. App. 1995) (circuit court's decision interpreting a MERA provision binds WERC where it is required to apply the statutory law: "That decision supplies the meaning of the term which WERC must apply"); *see also Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976) ("Where a court has jurisdiction over the subject matter and the parties, the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms. The subsequent appeal and reversal of the injunction here does not alter the obligation of the defendants in this case to initially comply with such injunction until it was stayed or set aside.") (footnote omitted). Even in a quasi-judicial capacity, an administrative agency like the WERC has no authority to overrule or ignore a court's interpretation of a statute, let alone a court's determination that a statute is unconstitutional. *See Madison Teachers, Inc.*, 197 Wis. 2d at 762. Even the WERC (the agency charged with implementation and enforcement of the changes to the Municipal Employment Relations Act imposed by Act 10) recognized that. In its emergency rules EMR1310 the WERC acknowledged that those changes were not applicable to MTI "unless and until the Circuit Court's decision is no longer in effect." Packard Aff., ¶9, Ex. 8, p. 2.

Further, Judge Colás's Order considered the parties' arguments in the *MTI v. Walker* case in the specific context of the teachers and other employees of MMSD that MTI represented. Judge Colás's Order gave MTI the ability to bargain without the constraints of the challenged Act 10 provisions, which meant the right to so bargain with MMSD, the only entity with which

MTI was certified to bargain. If Judge Colás had upheld Act 10 while others obtained a ruling in a different case finding Act 10 unconstitutional, absent an order from that other court enjoining enforcement of Act 10, MTI and MMSD would have had no choice but to follow Judge Colás's ruling. But that is not what happened.

E. MTI was entitled to rely on Judge Colás's Order.

Blaska next cites two cases — *Heritage Farms* and *Newhouse* — in support of an argument that "even MTI, which was a party to [*MTI v. Walker*], cannot rely on [Judge Colás's Order] here." Pl. Br. at 11. Neither case supports this assertion, because neither case addresses any of the issues in this lawsuit.

1. *Heritage Farms* has no application here.

To begin, *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, 339 Wis. 2d 125, 810 N.W.2d 465, addressed whether the supreme court's construction of a particular statute was entitled to retroactive effect. In analyzing this issue, the court explained that under the Blackstonian doctrine, as a general matter "***a new rule of law*** applies retroactively." *Id.* ¶ 44 (emphasis added). The court explained that this doctrine "is traditionally implicated in cases in which the court decides to overrule or repudiate an earlier decision," i.e., "past precedent." *Id.* ¶¶ 44-45. In his effort to force retroactive effect of the Supreme Court's July 31, 2014 reversal of Judge Colás's Order here, Blaska once again advances an incorrect definition of "precedent." As Blaska himself argues, a circuit court's ruling is not precedent. Reversing a lower court's decision is not overruling precedent. The Blackstonian doctrine has nothing to do with reversal of a lower court's decision in the same case; Blaska's suggestion that it does is misguided.

The distinct nature of the issue in *Heritage Farms* is also explained in *State v. Picotte*, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, which the *Heritage Farms* court relied on in its analysis. *See* 2012 WI 26, ¶ 44 (citing *Picotte*). As *Picotte* explained, the question of the

prospective versus retroactive effect of a court decision arises in cases where question at issue is the "overruling of a common-law rule." 2003 WI 42, ¶ 42.

Thus, the issue in *Heritage Farms* is distinct from the issue in this case. Here, the question is what effect Judge Colás's Order had on MMSD and MTI. This is not an issue of a court overturning past precedent or an established rule of common law. Rather, this case involves the effect of a circuit court ruling on a party in that case and that party's actions taken in reliance on that ruling while it was effective. This question is controlled by *Slabosheske*.

2. Even if *Heritage Farm* were applicable, "sunbursting" would apply here.

Moreover, even if this case involved the issue addressed in *Heritage Farms*, the Supreme Court's Act 10 ruling would ***still*** apply only prospectively to MTI and MMSD, i.e., to contracts entered into after July 31, 2014, the day the Supreme Court reversed the circuit court, given the facts here. The court in *Heritage Farms* explained that it is appropriate to apply a new rule of law prospectively only (which the court labeled "sunbursting") in circumstances where it is necessary to "alleviate the unsettling effects of a party justifiably relying on a contrary view of the law." *Id.* ¶ 45. Whether it is appropriate to sunburst a particular decision is based on an analysis of the equities, which involves consideration of three factors: (1) whether the court's holding establishes a new rule of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression, the resolution of which was not clearly foreshadowed; (2) whether retroactive application would further or impede the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results.

In this case, *Slabosheske* controls this analysis and requires that the court cannot retroactively undo an agreement entered into in reliance on a decision from a circuit court. But,

even if *Slabosheske* were not considered, the three factors outlined above would favor sunbursting of the supreme court's decision overturning Judge Colás's Order.

First, in negotiating and executing the CBAs, MMSD and MTI relied on Judge Colás's Order finding that portions of Act 10 were "null and void" and "without effect." When the Supreme Court reversed that Order, it changed the rules on which MMSD and MTI had relied: it put in place rules under which these parties had never previously operated.

Second, sunbursting the supreme court's reversal of the Order will not impede Act 10. In fact, it is ***consistent*** with the manner in which the challenged provisions of Act 10 were intended to go into effect. The provisions of Act 10 were never intended to become uniformly applicable on the same date or to disrupt collective bargaining agreements that were already in place. Rather, the new collective bargaining limitations in Act 10 were designed to be phased in as existing collective bargaining agreements terminated or were renewed. *See* 2011 Act 10 § 9332 (the relevant sections of Act 10 "first apply to employees who are covered by a collective bargaining agreement under subchapter IV of chapter 111 of the statutes that contains provisions inconsistent with those sections on the day on which the agreement expires or is terminated extended, modified, or renewed, whichever occurs first."); *see also* Wisconsin Legislative Council Act Memo Re: 2011 Wisconsin Act 10, p. 9, http://docs.legis.wisconsin.gov/2011/related/lcactmemo/act010, last viewed June 1, 2015 ("The provisions of Act 10 relating to collective bargaining first apply to employees who are covered by a collective bargaining agreement that contains provisions inconsistent with the Act's provisions on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first.").

The challenged agreements, while "inconsistent" with the Act's provisions, do not violate the Act because they were reached while the Act was not in effect as to these parties. The Act contemplated "inconsistency" and recognizes that such inconsistency is not illegal and does not render the inconsistent agreements void. In this case, the District employees who are members of collective bargaining units represented by MTI are covered by existing collective bargaining agreements — the 2014-2015 and the 2015-2016 CBAs — and it is therefore entirely consistent with Act 10 for the terms of those CBAs to remain in place until the CBAs terminate.[1]

Third, applying the supreme court's July 31, 2014 decision to retroactively void the existing CBAs as Blaska would have this court do would be substantially inequitable and would, in fact, harm taxpayers. MMSD and MTI reasonably relied on Judge Colás's Order in entering into the CBAs. The MMSD employees represented by MTI also relied on the Order and CBAs reached in light of it as defining the terms and conditions of their employment for duration of the agreements. It is fair to assume that these employees, like all employees, made investment, career, and other major life decisions in reliance on those agreements. For the rug to be pulled out from under those decisions would be fundamentally unfair.

Further, if the CBAs are invalidated, it is not clear how MMSD will be able to define the terms and conditions of employment for the employees represented by MTI. MMSD has taken the position that it has the authority to unilaterally impose the terms and conditions of employment outlined in the CBAs. Blaska has taken the contrary position, claiming that the District would be prohibited from unilaterally imposing the terms and conditions described in the

[1] Blaska asserts that certain of the CBAs "will not even come into existence until July, 2015." Pl. Br. at 12. He does not provide any evidentiary support for this contention, and it is not supported by the record. It is undisputed that MTI and the District negotiated and executed the CBAs prior to the Wisconsin Supreme Court's July 31, 2014 decision in *MTI v. Walker* and that all of the CBAs challenged here are currently in place. MMSD PUF ¶¶ 12-15; Pl. PUF ¶¶ 8, 12-13, 16.

CBAs, and he has threatened further litigation against MMSD if this were to occur. Pl. Br. at 16-17. Apparently, Blaska would have the employees work for free, or all quit, shutting down the public school system in the Madison metropolitan area. Thus, the invalidation of the CBAs would certainly result in incredible uncertainty, and lead to MMSD making otherwise unnecessary expenditures of taxpayer funds in order to implement new terms and conditions of employment for District employees (not to mention the cost associated with Blaska's specific threat of litigation).

In sum, *Heritage Farms* does not apply because there is no issue of a court overturning a common-law rule or past precedent. Further, even if it did apply, equity would favor allowing the existing CBAs to run their course.

3. *Newhouse* is equally inapplicable.

Blaska's arguments under *Newhouse v. Citizens Security Mutual Insurance*, 176 Wis. 2d 824, 501 N.W.2d 1 (1993) fare no better. *Newhouse* involved an insurer's contractual duty to defend, which has no applicability here.

The arguments in *Newhouse* revolved around a somewhat complicated set of procedural facts. Omann was involved in a farm accident in which his nephew was injured. At the time of the accident, Omann was insured by Citizens Security Mutual Insurance Company ("Citizens") under a homeowner's policy. After the accident, the nephew's parents sued Omann (and others) for negligence. Citizens, which was not initially named as a defendant, separately initiated a lawsuit against Omann seeking a declaratory judgment that its homeowner's policy excluded coverage for the accident. Citizens was then joined as a defendant in the negligence suit against Omann, and it raised the coverage issue as a defense in that lawsuit. *Id.* at 831.

Before the negligence lawsuit was decided, Citizens prevailed in its coverage suit and was awarded a declaratory judgment that its policy did not provide coverage for the accident. That decision was not appealed. Several months later, Citizens received an identical no-coverage ruling in the negligence lawsuit, and it was dismissed from that case. That decision was appealed by several parties (but not Omann). As this coverage appeal was pending, the negligence case went to trial on the merits. Citizens did not request a stay of the trial pending the appeal of the coverage determination, and it did not participate in the trial. The trial resulted in an award of damages against Omann of almost $600,000. *Id.* at 831-32.

Several months after the trial, the court of appeals determined that the Citizens policy provided coverage. Citizens paid out its policy limit, which covered only a fraction of the damages award against Omann. Omann then assigned any claims he had against Citizens to the parents of his nephew, and they brought suit against Citizens alleging (among other things) that it breached its contractual duty to defend Omann in the negligence suit. The parents prevailed in this lawsuit and were awarded almost $725,000 in damages. Citizens appealed. *Id.* at 832-33.

On appeal, the Wisconsin Supreme Court addressed the issue of whether Citizens was entitled to rely on the no-coverage decisions it received from the circuit court in its decision not to provide a defense in the negligence trial. *Id.* at 833-37. In analyzing this issue, the court applied Wisconsin law regarding an insurer's contractual duty to defend. Following *Elliott v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), the court summarized the applicable rule as follows:

> "An insurer does not breach its contractual duty to defend by denying coverage where the issue of coverage is fairly debatable as long as the insurer provides coverage and defense once coverage is established." *Elliott*, 169 Wis. 2d at 317. However, when coverage is not determined before a liability trial, the insurer must provide a defense for its insured with regard to liability and damages. *Id.*, 169 Wis. 2d at 318.

Newhouse, 176 Wis. 2d at 836. The court further explained that Wisconsin courts had established a clear procedure for an insurer to follow when a coverage determination is not final at the time of a trial: the insurer should request a stay of the trial pending the outcome of the coverage determination. *Id.* The court specifically noted that this rule applies even when there is a coverage determination at the circuit court level if that determination has been appealed. *Id.* The court explained that when an insurer does not follow this procedure (as was the case for Citizens), it "runs the risk of breaching its duty to defend." *Id.*

As this summary illustrates, *Newhouse* was decided under legal principles that have no application in this case. None of the parties in this case are insurers, and none of the claims involve the issue of an insurer's contractual duty to defend its insured. As such, the Court should disregard Blaska's arguments regarding *Newhouse* and apply the rule of *Slabosheske*, which is controlling in this case.

4. *Newhouse* principles support MMSD's position.

To the extent any part of *Newhouse* could possibly have any application here, it only supports MMSD's position, not Blaska's. *Newhouse* suggests that a party should obtain a stay if it wants a circuit court decision to not have effect pending appeal. Here, stays of Judge Colás's Order were sought repeatedly at the circuit court and appellate court levels. They were ***denied***. Moreover, *Newhouse* holds that an insurer cannot expunge a contractual duty it makes to its insured to defend the insured through litigation until there is a final unappealable decision on the duty to defend. In doing so, *Newhouse* re-affirms that parties will be held to the contractual promises they make to each other. Here, MMSD made contractual promises to MTI and vice versa and those deserve recognition.

III. THE CBAS DO NOT VIOLATE ACT 10.

Blaska argues that the CBAs are void because they violate Act 10. MMSD's Summary Judgment Brief addresses why the CBAs do not violate Act 10; MMSD incorporates those arguments here. *See* MMSD Br. at 11-16. In short, based on the rule of *Slabosheske*, because the CBAs were negotiated and executed in reliance on Judge Colás's Order before the Order was overturned, they are lawful and entitled to their effect.

Blaska does, however, raise one argument that is not addressed squarely by MMSD's previous briefing. He cites several cases for the proposition that because the CBAs include terms that are "expressly prohibited" by Act 10, the CBAs are illegal contracts that are unenforceable under Wisconsin law. Pl. Br. at 13. Blaska contends specifically that fair share and dues deductions are expressly prohibited by Act 10 and that these provisions therefore cannot be enforced. But this argument does not provide a basis on which to invalidate the CBAs for several reasons.

First, the fact that a collective bargaining agreement may require a municipal employer to perform acts that are ***now*** expressly prohibited by the language in Act 10 (such as fair share and dues deductions) is not, in itself, prohibited by Act 10. In fact, such situations are ***anticipated*** by Act 10. As discussed above, Act 10 was drafted so that the new restrictions on collective bargaining would be phased in as existing collective bargaining agreements expired. 2011 Act 10 § 9332. As such, Act 10 contemplated that municipal employers would continue to engage in conduct "expressly prohibited" by Act 10 under existing collective bargaining agreements even after Act 10's effective date. This phase-in rationale, which the legislature chose to include as part of Act 10, applies equally to MTI and MMSD under the facts of this case, given the ruling of Judge Colás. It is therefore consistent with Act 10 to permit the CBAs, which were negotiated

and executed when Act 10 was, at least for these parties, "null and void" and "without effect," to run their course, including the fair share and dues deductions that Blaska asserts in this lawsuit are expressly prohibited by Act 10.

Moreover, this result is also consistent with the holding of the Wisconsin Supreme Court that "collective bargaining agreements and statutes also governing conditions of employment must be harmonized whenever possible." *Glendale Professional Policemen's Assn. v. Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594 (1978). Under this rule, courts "will enforce the rights the parties have bargained for unless their agreement is in 'irreconcilable conflict' with a state statute." *Brown v. AFSCME*, 2007 WI App 247, ¶ 11, 306 Wis. 2d 213, 742 N.W.2d 916 (quoting *Glendale*, 83 Wis. 2d at 106).

This point also illustrates why Blaska's attempt to analogize this case to a circumstance in which an employer and employee enter into an employment arrangement involving sub-minimum wages fails. *See* Pl. Br. at 3. Unlike Act 10 and the CBAs in this case, an agreement between an employer and an employee for payment of sub-minimum wages cannot be harmonized with the law. It is well established that minimum wage and overtime protections may not be waived by a direct agreement between an employer and an employee or through a collective bargaining arrangement. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945); *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728 (1981). Of course, if a new law governing minimum wage were to have a provision similar to 2011 Act 10 § 9332, which allowed existing wage agreements to continue until expiration or modification before the new law applied to the contracting parties, the new law was to be found unconstitutional, the employer and employee were to reach a new agreement providing for wages that would otherwise not be allowed under the new law, and then the lower court were reversed, then the

analogy would be complete. In such circumstance, the contracts made while the law was not in effect would be enforceable. That would not be "astonishingly illogical" at all.

Blaska's analogy as written, however, is simply a red herring. Rather than focusing on the facts in the record, and the controlling case law, Blaska is attempting to have the Court decide this case on alternative facts and inapplicable law. The Court must reject those efforts.

Second, as explained in MMSD's Summary Judgment Brief, Blaska does not have standing to assert any claims regarding the fair share and dues deductions of teachers because he cannot demonstrate the pecuniary harm to taxpayers necessary to support taxpayer standing in regard to these claims. MMSD Br. at 23-28. Teachers make those payments and it costs MMSD (and by extension taxpayers) nothing. Therefore, Blaska cannot seek to invalidate the CBAs on these grounds.

Third, Blaska has failed to present admissible evidence to support his standing as a taxpayer. As that is the sole basis of his standing to challenge the collective bargaining agreements between the defendants, his substantive claims must be dismissed. The only fact Blaska asserts to provide standing to assert his challenge is that he is "a resident of the City of Madison and a taxpayer whose taxes are used to fund the District." Pl. Br., PUF ¶ 2, p. 4. To support that factual assertion, he cites his Complaint and the defendants' Answers. But those Answers did not admit that assertion. Rather, all defendants denied it and put Blaska to his proof. There is no such evidentiary proof in the record, and it is past time to offer it. For that reason alone, this court should deny Blaska's motion for summary judgment, grant MMSD's motion for summary judgment, and dismiss this case.

IV. BLASKA HAS NOT MET HIS BURDEN FOR THE AWARD OF A TEMPORARY OR PERMANENT INJUNCTION.

Blaska has requested both a temporary and permanent injunction prohibiting further enforcement of the CBAs. Injunctive relief is "not to be issued lightly," and is appropriate only where the cause is "substantial" and the movant has established all of the necessary elements. Blaska must establish the following elements before the Court may issue a permanent or temporary injunction:

1. A reasonable probability of success on the merits (for a temporary injunction);

2. That he lacks an adequate remedy at law;

3. That future conduct of the defendants will violate his rights as a taxpayer and he will suffer irreparable harm if the injunction is not issued (for a temporary injunction, this requires proof that an injunction is necessary to preserve the status quo); and

4. That, on balance, equity favors issuing the injunction.

Pure Milk Products Coop., 90 Wis. 2d at 800; *Werner*, 80 Wis. 2d at 519-20. Blaska has not (and cannot) establish ***any*** of these elements.

A. Blaska has not demonstrated a likelihood of success on the merits.

As to Blaska's likelihood of success on the merits, MMSD incorporates by reference its Summary Judgment Brief. Blaska is not only unlikely to succeed, but summary judgment should be entered in favor of the defendants.[2]

B. Blaska does not lack an adequate remedy at law.

Here, Blaska has an adequate remedy at law, which precludes injunctive relief. Blaska seeks in this lawsuit a declaratory judgment. A declaratory judgment provides Blaska with an

[2] Blaska's inability to demonstrate a likelihood of success on the merits reaches beyond just his merits arguments to the procedural issues with this lawsuit, including his failure to comply with the notice of claim requirements of Wis. Stat. § 893.80 and his lack of standing. In regard to the standing issue, Blaska has asserted only taxpayer standing, but he has failed to come forward with any admissible evidence to establish that he is a taxpayer or that taxpayers, as a class, have suffered any pecuniary harm. *See* MMSD Response to Pl. PUF ¶¶ 2, 17.

adequate remedy at law. He has not demonstrated that MMSD would fail to comply with a declaratory judgment entered by this Court. In addition, Blaska's lack of taxpayer standing precludes injunctive relief as well. Because Blaska has not established standing to bring a suit in law or in equity, he cannot lack an adequate remedy at law.

C. Blaska has not demonstrated that he will be irreparably harmed if the CBAs continue to be enforced.

This element imposes a different standard for temporary and permanent injunctions, and Blaska cannot succeed under either analysis.

1. Blaska cannot demonstrate that a temporary injunction is necessary to preserve the status quo.

A temporary injunction will be issued only when necessary to preserve the status quo. *Werner*, 80 Wis. 2d at 520. Here, the status quo is that the CBAs govern the terms and conditions of employment of the District employees represented by MTI. MMSD and MTI negotiated and agreed to these terms, and they were ratified by MTI's members. These parties never operated under the new limitations on collective bargaining imposed by Act 10: Blaska seeks through a temporary injunction to impose those limitations for the first time on these parties. The relief that Blaska is seeking with a temporary injunction would not only disrupt the status quo, it would impose a great deal of uncertainty and havoc for MMSD, MTI, and the employees who are currently subject to the CBAs. As discussed above, Blaska has taken the position that if the CBAs are invalidated, MMSD would not be permitted to legally impose any of the terms of the CBAs on District employees. Rather, according to Blaska, MMSD would have to "decide on new terms and conditions" and "do so in a manner consistent with Act 10." Pl. Br. at 17. It is not clear what this means, but enjoining the CBAs certainly would not be in preservation of the status quo. Rather than seeking to preserve the status quo, Blaska is seeking

to change the existing relationship between the employees represented by MTI and MMSD. This is not an appropriate application for a temporary injunction.

2. Blaska cannot establish that he will suffer irreparable harm necessary to justify a permanent injunction.

Blaska has also failed to demonstrate that he (or more precisely MMSD taxpayers) would suffer any irreparable harm if a permanent injunction is not issued. In support of this element, Blaska first argues that "the District is spending substantial amounts of taxpayer money on a contract that is illegal." But Blaska has not come forward with any admissible evidence of these alleged illegal expenditures. Instead, his sole proposed fact regarding such expenditures is unsupported by admissible evidence: it is without foundation, speculative, and inadmissible hearsay. *See* MMSD Resp. to Pl. PUF ¶ 17. Moreover, as explained in MMSD's Summary Judgment Brief, MMSD does not incur any additional costs or make any illegal expenditures of public funds under the CBAs. *See* MMSD Br. at 23-28.

Blaska next argues, citing *Joint School District No. 1 v. Wisconsin Rapids Educational Association*, 70 Wis. 2d 292, 234 N.W.2d 389 (1975), that the irreparable harm element can be met "even in the absence of an express showing of irreparable harm." Pl. Br. at 16. But this is not the holding of *Joint School District No. 1*, and *Joint School District No. 1* does not support issuing an injunction in this case. To begin, *Joint School District No. 1* did not hold that an injunction is available to restrain illegal activity without a showing of irreparable harm; it held the opposite — that irreparable harm is a necessary element even for injunctions seeking to restrain illegal activity: "Nevertheless, the key prerequisite to injunctive relief — irreparable harm — remains, and a court should not restrain illegal acts merely because they are illegal unless the injury sought to be avoided is actually threatened or has occurred." *Id.* at 311; *see also Werner*, 80 Wis. 2d at 520 & n.7 (citing *Joint School District No. 1* for the proposition that

"[i]njunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm").

Moreover, in *Joint School District No. 1*, which involved the issue of whether a circuit court abused its discretion in granting an injunction to halt a teacher strike, the court specifically ***rejected*** the argument "that the fact that the strike was illegal is enough to warrant issuance of the injunction without an express showing of harm." 70 Wis. 2d at 310. The court's ultimate holding, that the circuit court did not abuse its discretion in awarding an injunction against the teacher strike, was premised on a conclusion that the trial court had properly found that the plaintiffs had presented sufficient ***evidence*** to establish irreparable harm. *Id.* at 313.

Even if the court in *Joint School District 1* had accepted the argument that the showing of an illegal strike was adequate to justify an injunction "without an express showing of harm," that still would not help Blaska in this case. The discussion of this issue in *Joint School District No. 1* was limited to injunctions seeking to enjoin municipal employee strikes, which is not at issue here. Further, the court indicated that even if it had adopted the proposed rule that an injunction could be issued without an express showing of irreparable harm, the rule would apply ***only*** where a plaintiff could demonstrate "the potential for immediate and serious harm to public health and safety" (such as in the case of a strike involving police officers or firefighters). *Id.* at 312. Blaska has not presented any evidence that would even come close to meeting this standard and it is no wonder. Allowing the CBAs to run their course does not present serious harm to public health and safety.

Blaska next points to potential future claims from teachers as a basis for establishing irreparable harm. But, again, Blaska presents no admissible evidence to substantiate this alleged risk. As MMSD explained in its Summary Judgment Brief, Blaska cannot rely on speculation to

establish harm. MMSD Br. at 26-28. Indeed, no teacher has brought suit even though the 2014-2015 CBA has nearly been completed. Moreover, the threat of lawsuits does not demonstrate ***irreparable harm***, because lawsuits pose only a threat of money damages. *Rapids Assocs. v. Shopko Store, Inc.*, 96 Wis. 2d 516, 520-21, 292 N.W.2d 668 (Ct. App. 1980) ("The equitable remedy of injunction is not appropriate except in cases where the plaintiff suffers irreparable injury that cannot be remedied by money damages.").

Blaska's final arguments on irreparable harm are in response to MMSD's position in its responsive pleadings that MMSD could unilaterally impose on those employees represented by MTI the terms and conditions of employment currently described in the CBAs. Blaska disputes this, but points to no authority to support his position. Pl. Br. at 16-17. Instead, Blaska again grasps for an analogy. He asserts that allowing MMSD to unilaterally impose the terms and conditions of the CBAs would be akin to allowing competitors who are found liable for engaging in a price-fixing scheme to then unilaterally impose their fixed prices. Pl. Br. at 17. But MMSD and MTI are not commercial competitors, this is not an antitrust case, and the issue of whether a court in an antitrust action should issue an injunction restraining otherwise lawful behavior raises complex issues of law and fact that Blaska does not even begin to address with this undeveloped argument. Courts do not consider arguments unsupported by references to legal authority. *See Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. The Court must decide this case on the actual facts and the applicable law. There is nothing in Act 10 or in Wisconsin law more generally that would limit MMSD's ability to unilaterally continue the employment of its employees under the same terms and conditions that are outlined in the CBAs.

Further, in regard to fair share and dues deductions in particular, even if MMSD would not be able to impose these aspects of the CBAs after the CBAs expire (i.e., when Act 10 is

effective for MMSD and MTI), this still does nothing to help Blaska establish irreparable harm to ***taxpayers***, which he has the burden to show with admissible evidence. As discussed in MMSD's Summary Judgment Brief, while fair share and dues deductions impact ***teachers***, they have no impact on ***taxpayers***; they involve no illegal expenditure of public funds and do not impose any costs on the District. MMSD Br. at 26. Blaska therefore cannot rely on the allegedly illegal continuation of fair share and dues deductions (or any of the other alleged violations of the rights of teachers) to meet his burden of demonstrating that taxpayers will suffer irreparable harm without the requested injunctive relief. These issues simply do not affect taxpayers, much less cause them irreparable harm.

An injunction is an extraordinary remedy that can be granted only based on an affirmative showing of irreparable harm. In this case, Blaska has submitted no admissible evidence to establish that taxpayers will suffer irreparable harm without the requested injunctive relief. The only "evidence" that Blaska has submitted is the affidavit of his attorney, which includes as an exhibit an unauthenticated printout of what he represents to be a proposed budget from the District's website. Even if this were admissible evidence, which it is not (*see* MMSD Response to Pl. PUF ¶ 17), it still could not establish irreparable harm. Blaska asserts that this "evidence" demonstrates that the District is illegally expending substantial amounts of taxpayer money "for salaries and benefits." Pl. Br. at 15. But as discussed elsewhere, the District would be spending this money regardless of the CBAs. As such, even if evidence of this allegedly illegal expenditure were properly before the Court, Blaska could not establish irreparable harm to taxpayers. What Blaska is attempting to do is bootstrap the extraordinary remedy of injunctive relief to a claim for a declaratory judgment. But this attempt must fail — Blaska does not even come close to establishing the basic prerequisites for this type of relief.

D. The equities do not favor an injunction.

Blaska makes no argument that the equities favor an injunction in this case, and as such he has failed to establish a necessary element for injunctive relief. But even if Blaska had argued this point, he could not have met his burden because the equities do not favor an injunction. As discussed elsewhere in this brief, the CBAs include terms and conditions of employment that were negotiated between the District and MTI and ratified by MTI's members. District employees therefore have an expectation that they will be employed through the 2015-2016 school year under the agreed-upon terms of employment. They have made decisions, small and large, for themselves and their families based on these expectations. It would be inequitable to deprive them of the compensation and terms spelled out in the CBAs. It would also be inequitable to deprive the District and MTI of their bargained-for agreement. Moreover, invalidating the CBAs would also violate the well-established principles of Wisconsin law (which are grounded in equity) that courts should enforce rights that have been bargained for and harmonize collective bargaining agreements with the statutes whenever possible. Finally, an invalidation of the CBAs would provide no benefit to taxpayers. In fact, as already discussed, an invalidation of the CBAs would likely harm taxpayers because of the cost and uncertainty that would be associated with the District implementing new terms and conditions of employment.

Relief Sought

For the reasons stated above, MMSD respectfully requests that the Court deny Blaska's motion for summary judgment and his requests for injunctive relief, and grant summary judgment to the defendants.

Dated this 1st day of June, 2015.

Respectfully submitted,

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