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July 24, 2015

Via Hand Delivery
Honorable Peter C. Anderson
Circuit Court Chambers, Branch 17
Dane County Courthouse, Room 6103
215 South Hamilton Street
Madison, Wisconsin 53703

RE: Norman Sannes v. Madison Metropolitan School District, et al.
Case No.: 15-CV-974

Dear Judge Anderson:

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

Very truly yours,

BOARDMAN & CLARK LLP

Sarah A. Zylstra

Sarah A. Zylstra

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

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

NORMAN SANNES,

Plaintiff,

v.

Case No.: 15-cv-974
Case Code: 30701
Declaratory Judgment

MADISON METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT, et al.

Defendants.

MMSD DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE

Sannes asserts that he may step into the shoes of MMSD teachers to litigate alleged violations of teachers' rights. However, because the alleged rights violations do not implicate any expenditure of taxpayer funds, Sannes does not have standing to independently assert any claims based on them. Nevertheless, Sannes asserts that he can because he has ***separate*** factual allegations supporting claims that implicate expenditure of taxpayer funds and corresponding harm to taxpayers, thereby allowing him to bootstrap allegations that solely implicate harm to teachers. Taxpayer standing does not work that way. Taxpayers have standing to assert claims that implicate pecuniary harm to taxpayers. Taxpayers do not have standing to assert claims that involve no harm to taxpayers, and a taxpayer may not pursue claims challenging a governmental action merely on the basis of disagreement. The motion to strike should be granted.

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

Sannes argues that the District's motion should be denied because: (1) it was "untimely" due to not being filed "before" the District's answer; and (2) the motion is a "disguised

dispositive motion." Pl. Br., at 1-2. Neither argument has merit. 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 and Answer and Affirmative Defenses, the motion to strike appears immediately before the answer. Thus, Sannes'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, Sannes cites no 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 document, and there is no logical basis for such a result. Sannes supplies no reason for such overly technical treatment nor does he point to any prejudice to him arising from the presentation of the motion to strike directly before the answer in a single pleading. 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.

Sannes next argues that the District's motion to strike is really a motion to dismiss or a motion for summary judgment. Not so. Section 802.06(6) permits the Court to strike any "immaterial [or] impertinent" allegations from Sannes's complaint. Sannes is pursuing this lawsuit solely as a taxpayer. Taxpayers have standing to pursue only claims based on allegations of pecuniary harm to them. Sannes's allegations regarding the rights of teachers do not fall into this category; they assert only harm to ***teachers, not taxpayers***. As such, these allegations are immaterial and not pertinent to the claims that Sannes may pursue as a taxpayer. They should therefore be stricken from the complaint.

Further, Sannes has cited no law to support his contention that the District's motion constitutes a "disguised dispositive motion" that is somehow inappropriate at this stage of the litigation. The District asks the court to do only what § 802.06(6) permits — strike specific allegations from Sannes's complaint because they are immaterial and impertinent. The District has not asked the court to dismiss any of Sannes's *claims* (as would be the case in a motion to dismiss), nor has it *submitted evidence* and argued that Sannes's claims should be dismissed on that basis (as would be the case in a motion for summary judgment). *See First Nat'l Bank v. Dickinson*, 103 Wis. 2d 428, 431-33, 308 N.W.2d 910 (Ct. App. 1981) (distinguishing motions to strike from motions to dismiss).

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

Sannes acknowledges that his sole basis for standing is his status as a taxpayer. *See* Pl. Br., at 2-3. He fails, however, to put forward any arguments that support a taxpayer's standing to allege infringements 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. [1]

Sannes 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

[1] This motion to strike relates solely to the allegations of teacher rights violations. The District does not concede that Sannes has standing generally and reserves its right to challenge his standing more broadly in the future.

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 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 Sannes 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.'").

Sannes'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 — 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).

Sannes attempts to sidestep this deficiency by relying on allegations in his complaint that are related to other contract provisions (and are not subject to this motion to strike). *See* Pl. Br., at 7. Specifically, Sannes 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] But 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 District moves to strike allegations that teachers have rights 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 implicate any expenditures by the District or pecuniary harm to taxpayers. *See id.* at 7-8. This precludes a taxpayer's ability to make these allegations. And Sannes's allegations in paragraphs 39 and 40 do not change this, because they do not link the alleged infringement of teachers' rights to any expenditure of taxpayer funds by the District:

- Paragraph 39 includes an allegation that the CBAs will require expenditure of tax money; it does not link any expenditures to the alleged violations of teacher rights.

[2] Sannes also cites paragraph 41, which is subject to the motion to strike and addressed separately later in this brief. The three paragraphs on which Sannes relies are actually found in the complaint at paragraphs 41, 42, and 43, not 39, 40, 41. As plaintiff's response brief has quoted those paragraphs in full and repeatedly refers to numbers 39-41, defense counsel has used the 39-41 designations on reply.

- Paragraph 40 alleges that administration of the CBAs, including administration of dues deductions, 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).

Because Sannes cannot cite any allegations in his complaint that link his allegations regarding infringement of teachers' rights to any alleged pecuniary harm to taxpayers, he does not have standing as a taxpayer to litigate his allegations regarding teachers' rights.

In essence, Sannes is attempting bootstrap the teachers' rights allegations that the District has moved to strike to other allegations that are not subject to the District's motion. Sannes cites no authority that permits a taxpayer to piggyback allegations that do not implicate harm to taxpayers onto allegations that do. Permitting Sannes to move forward in this manner would be contrary to the well-established principle that taxpayer standing is premised on an injury to taxpayers. Simply because Sannes may have standing to assert a claim based on some facts alleged in his complaint does not mean that he has standing to pursue that claim based on *other* allegations. 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. It is elementary that Sannes lacks standing to bring a lawsuit based solely on his teachers' rights allegations. Given that, how can he be permitted to litigate those allegations in this lawsuit?

In addition, Sannes's allegations regarding teachers' rights fail to establish taxpayer standing under applicable pleading standards. Sannes 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 teachers' rights allegations. While the court does accept well-pleaded

facts as true, Sannes ignores the recent clarification to Wisconsin's pleading standards. Under those standards, the teachers' rights allegations fall well short of establishing taxpayer standing.

First, as Sannes'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 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 plead to show entitlement to relief, adopting the standard from a leading case 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 had 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. That is not the law anymore. *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, Sannes's allegations relating to teachers' rights are insufficient because they allege legal conclusions untethered to his standing as a taxpayer, without alleging facts plausibly suggesting that he is entitled to the relief he seeks. Sannes ignores the specific paragraphs that the District seeks to strike. Instead he sets up a strawman argument and commingles the allegations at issue with others that are not at issue. He points to paragraphs 39 and 40 of his

complaint. On their face, those paragraphs arguably allege taxpayer harm. But, again, the District has not moved to strike them.

The District has moved to strike paragraphs 1(c), 11, 30, 35, 43, and portions of paragraph 27, which assert infringement of teachers' rights separate and distinct from any taxpayer harm. 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 allege legal conclusions, which are insufficient to state a claim under *Data Key Partners*. Further, even if Sannes could overcome that hurdle, he makes only general allegations and does not allege facts that *plausibly* tie his teachers' rights allegations to any alleged expenditure of tax funds. Whether a teacher does or does not have a right to refrain from union activity has no bearing on Sannes as a taxpayer. Sannes's teacher rights allegations therefore do not meet the requirements of *Data Key Partners*.

Finally, the taxpayer standing cases that Sannes cites — *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 tax funds under the contracts was illegal. *Hart*, 176 Wis. 2d at 696; *S.D. Realty Co.*, 15 Wis. 2d at 21. Thus, there was a direct link in these cases between the challenged actions and plaintiffs' taxpayer status.

Here, in contrast, there is no link between Sannes's allegations regarding infringement of teachers' rights and his taxpayer status. Even if those allegations were true, the harm (if any) would be suffered by teachers, not taxpayers. 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. Because they lack any connection to taxpayers, these allegations are not analogous to those in *S.D. Realty*, *Hart*, *Bechthold*, and *Wagner*. None of Sannes's cases support taxpayer standing to challenge aspects of a governmental contract that do not injure taxpayers.

Sannes 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.

Here, in contrast, the type of injury that Sannes asserts—potential future lawsuits brought by teachers—is unquestionably too remote and hypothetical to support standing. Sannes makes no plausible allegations that these lawsuits will ever be filed.[3] And, as discussed in the District's initial brief, Wisconsin law requires an actual injury to support standing.[4] Defs. Br., at 8-9.

III. Judge Niess's decision in *Blaska* does not compel denial of the District's motion.

Sannes argues that the District's motion should be denied based on Judge Niess's denial of the District's motion to strike the same factual allegations in *Blaska.* Pl. Br., at 8-10. The District addressed Judge Niess's decision in its opening brief (at 10-14), and Sannes's arguments on this point merely rehash arguments made elsewhere in his brief—that he can establish taxpayer standing for his teachers' rights allegations by piggybacking on unrelated allegations regarding taxpayer harm and that the possibility of future lawsuits by teachers support taxpayer standing. As addressed elsewhere in this reply, these arguments fail to link Sannes's teachers' rights allegations to any pecuniary harm to taxpayers, and therefore those allegations therefore should be stricken.

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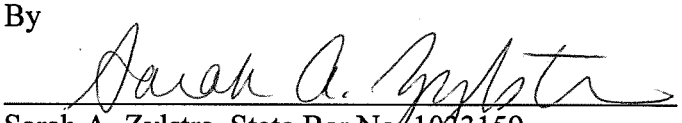
[3] Sannes objects that the District's argument that no teacher has sued the District is not a fact in record, but this criticism misses the mark. He has not alleged any actual lawsuits, and his own complaint reinforces that no suit has been brought as it specifically alleges only ***exposure*** to suit,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

[4] Sannes 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 24th day of July, 2015.

BOARDMAN & CLARK LLP
By



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