STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE OF WISCONSIN *ex rel.*
JOSEPH A. RICE,
Plaintiff,

v. Case No. 13-CV-4222

MARINA DIMITRIJEVIC, WILLIE JOHNSON, JR.
DAVID CULLEN, and MILWAUKEE COUNTY
BOARD OF SUPERVISORS,
Defendants.

PLAINITFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

In 2011, the Wisconsin Legislature made sweeping changes in the law that governs collective bargaining by public employee unions – changes that substantially limited the matters that can be the subject of collective bargaining and that increased the freedom of public employees to make their own choices about union membership. *See* 2011 Wisconsin Acts 10 and 32 (collectively "Act 10"). The law imposed certain new requirements for certification and recertification of these unions and, in the wake of Act 10, a number of them were either decertified or chose not to be recertified.

This Court can take judicial notice, Wis. Stat. § 902.01, of the controversy following the enactment of Act 10, including mass protests, numerous recall elections (including a historic and unsuccessful attempt to recall the governor) and numerous legal challenges.[1] Act 10 was a matter of extraordinary public interest.

[1] *See, e.g.*, *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013); *Laborers Local 236, AFL-CIO v. Walker*, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013); *Wisconsin Law Enforcement Ass'n v. Walker*, Dane County Circuit Court No. 12CV4474; *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court No. 11CV3774.

On March 14, 2013, the Finance, Personnel, and Audit Committee ("FPAC") of the Milwaukee County Board of Supervisors ("Board") decided to do an astonishing thing respecting this new law of unprecedented public interest. It decided to ignore it. And it made that decision in secret.

On that date, FPAC voted to commence negotiations with five county employees unions – one of which had failed to recertify and no longer represented any county employees – on subjects that are not permitted by Act 10. FPAC never provided notice that it would be considering taking that action, leaving the public completely in the dark about its plan. Furthermore, FPAC did not follow the proper procedure for entering into closed session and took actions in the closed session not permitted under Wisconsin law.

The Plaintiff, Joseph Rice (himself a former Board member), by his relation on behalf of the State of Wisconsin, seeks to hold FPAC and its members accountable for these violations of the Open Meetings Law.

The Plaintiff also challenges a separate and unrelated violation of the Open Meetings Law, in which a quorum of the Board attended a hearing of the Wisconsin Legislature on April 10, 2013. Almost all of the County Board members in attendance offered testimony about the bill being discussed at that hearing, 2013 Assembly Bill 85. Assembly 85, which became 2013 Wisconsin Act 14, significantly altered the structure and powers of the Milwaukee County Board. No notice of the Board's attendance at that hearing was ever posted. The Open Meetings Law requires a governmental body to provide notice when a quorum of its members will be attending another governmental body's meeting, unless such attendance is social or by chance. The attendance of the Milwaukee County Board members at the Madison hearing was not social

and did not occur by chance. Accordingly, the Plaintiff seeks to hold the Board accountable for this violation of the Open Meetings Law as well.

The Defendants have moved for judgment on the pleadings. A judgment on the pleadings is treated as a motion for "summary judgment minus affidavits and other supporting documents." *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). The court must test whether the complaint states a claim for relief and must accept all facts pleaded by the plaintiff and reasonable inferences drawn from them as true. *Id.* "The complaint should be found legally insufficient only if 'it is quite clear that under no circumstances can the plaintiff recover.'" *Id.* (quoting Clausen & Lowe, *The New Wisconsin Rules of Civil Procedure Chapters 801-803*, 59 Marq. L. Rev. 1, 55 (1976).

For the following reasons, this Motion should be denied and the case should be permitted to proceed to discovery.

ARGUMENT

I. FPAC'S MARCH 14, 2013 AGENDA FAILED TO APPRISE THE PUBLIC THAT FPAC WOULD DISCUSS AND VOTE ON ENTERING INTO COLLECTIVE BARGAINING IN VIOLATION OF ACT 10.

The Defendants' arguments for dismissing this claim ignore the thrust of the Plaintiff's Complaint. The Plaintiff has no quarrel with the fact that FPAC conferred with its legal counsel or developed negotiation strategy in closed session. But the Complaint alleges that FPAC "authorized and instructed County Labor Relations Director Fred Bau or another person to enter into contract negotiations with" five unions – including one that was no longer an authorized collective bargaining representative – on subjects that could not be collectively bargained. (Complaint, ¶¶15-19.) Nothing about that decision needed – or is permitted – to be kept secret. To the contrary, it was something that the public had the right to know. It is those particular

actions – which this Court must assume for now actually occurred – that the Plaintiff alleges were not adequately disclosed by the notice.

A. Legal Standards for Adequate Notice

It is the declared public policy of Wisconsin that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business," and to that end, "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(1), (2).

Furthermore, "[e]very meeting of a governmental body shall be preceded by public notice." § 19.83. Notice "shall be given at least 24 hours prior to the commencement of such meeting," § 19.84(3), and "shall set forth the time, date, place *and subject matter* of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof," §19.84(2) (emphasis added).

The standard established by the courts as to whether a notice is "reasonably likely to apprise members of the public" of the subject matter of the meeting is based on "what is reasonable under the circumstances." *Buswell v. Tomah Area School District*, 2007 WI 71, ¶22, 301 Wis. 2d 178, 732 N.W.2d 804. Courts apply a three factor test to gauge reasonableness: "the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate." *Id.*, ¶28.

B. FPAC's Agenda Failed to Give Adequate Notice to Apprise the Public that FPAC Would Discuss and Vote on Entering into Collective Bargaining in Violation of Act 10

Here is the portion of the Agenda addressing FPAC's March 14, 2013 closed session:

CLOSED SESSION

The Committee may adjourn into closed session under the provisions of Wisconsin Statutes, Section 19.85(1)(e), (g) for the purpose of the Committee deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session; And for the purpose of the Committee receiving oral or written advice from legal counsel concerning strategy to be adopted with respect to pending or possible litigation with regard to the following matter(s). At the conclusion of the closed session, the Committee may reconvene in open session to take whatever action(s) it may deem necessary.

34 13-4 From the Department of Labor Relations reports related to deliberation, negotiation or renegotiation of collective bargaining agreements.

1:30 p.m.

35 13-6 From Corporation Counsel, submitting an informational monthly report providing an update on the Status of Pending Litigation. **(To the Committees on Judiciary, Safety and General Services and Finance, Personnel and Audit) (INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)**
Attachments: JANUARY REPOT
Auio FPA 01/31/13
MARCH REPORT

36 12-1011 From the President & CEO of the Marcus Center for the Performing Arts, providing a verbal update on the Status of Negotiations between Milwaukee County and the Marcus Center for the Performing Arts for the proposed new parking structure project and other building developments at the Marcus Center for the Performing Arts. **(INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)**
Attachments: Audio PARKS 12/11/12

Complaint, Exh. A (formatting reproduced as closely as possible).

This notice is broken into two sections by a semi-colon. The first section of the notice was not "reasonably likely to apprise members of the public" that FPAC was considering voting on entering into collective bargaining with five unions over terms prohibited by Act 10,[2] including one union that had not stood for a recertification election under Act 10 and therefore

2 At the very least, the contracts contain provisions for the deduction of union dues, which is unlawful. (Complaint, ¶21, *see* Wis. Stat. § 111.70(3g) ("A municipal employer may not deduct labor organization dues from the earnings of a general municipal employee or supervisor."). Discovery may reveal other terms that violate Act 10.

had no lawful authority to represent county employees in negotiations. (Complaint, ¶¶15, 23; *see* Wis. Stat. § 111.70(4)(d)3.b.[3]) That section merely quoted § 19.85(1)(e): "Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session."

The notice language copied from the statute posits three separate subject matters (purchasing property, investing funds, conductive other public business) and two separate justifications (competitive *or* bargaining reasons). The notice failed to indicate which of those three subject matters were going to be discussed and which of the two statutory justifications justified this particular closed session. The public should not have to guess from among the universe of possibilities of "other public business" what a governmental body is going to do. *See* Compliance Guide (Def. App. A), at 13 ("Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session.").

Nor was the second section of the notice following the semi-colon – the only part that mentioned collective bargaining – reasonably likely to apprise the public that FPAC would discuss and vote on entering into collective bargaining in violation of Act 10. At most, that portion of the notice informed the public that FPAC would **receive a report** from a county employee on collective bargaining and **receive advice** from counsel on the legality of such collective bargaining. Compared to the notice found inadequate in *Buswell* – "Contemplated

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3 "Annually, the [Wisconsin Employment Relation C]ommission shall conduct an election to certify the representative of the collective bargaining unit that contains a general municipal employee. The election shall occur no later than December 1 for a collective bargaining unit containing school district employees and no later than May 1 for a collective bargaining unit containing general municipal employees who are not school district employees. The commission shall certify any representative that receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit. If no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented."

closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. § 19.85(1)(c)," 2007 WI 70, ¶36 – the notice here is even *less* specific with regard to contemplating negotiation.

Under the three-part *Buswell* test, the Agenda was not reasonably likely to apprise the public of the subject matter of the portion of March 14, 2013 FPAC meeting where the committee went into closed session to discuss and vote on entering into collective bargaining: (1) it would not have been burdensome to provide more detailed notice; (2) the public had a significant interest in public-sector collective bargaining in light of Act 10; and (3) voting to enter into illegal collective bargaining is not a routine matter the public would be likely to anticipate.

First, it would not have been burdensome to add the sentence or two necessary to apprise the public that FPAC was considering entering into collective bargaining negotiations with five unions. Unlike all other Wisconsin counties, Milwaukee County has a full-time County Board of Supervisors, with a large staff and extensive resources. This is not a "parttime citizen board" that the *Buswell* court was concerned with protecting from unreasonable burdens. *See* 2007 WI 71, ¶29 (quoting *Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993)).

Even if it were a small, part-time governmental board instead of the experienced behemoth it is, neither the Board nor FPAC would be burdened by adding the few words the Plaintiff would like to see. FPAC clearly knows how to write agenda items that indicate potential action that might be taken. *See* Complaint, Exh. A. Numerous agenda items indicate, for example, that a county employee or official was "requesting authorization" to take some action, or that the committee would consider "adoption of a resolution/ordinance." Item 36 is an

excellent example of a clear subject matter related to negotiation: "the Status of Negotiations between Milwaukee County and the Marcus Center for the Performing Arts for the proposed new parking structure project and other building developments at the Marcus Center for the Performing Arts." That notice clearly indicates what is being negotiated (a proposed new parking structure) and with whom the negotiation was taking place (the Marcus Center).

The Defendants cannot credibly claim it would have been at all burdensome to print a notice such as this:

> **The Committee may adjourn into closed session under the provisions of Wisconsin Statutes, Section 19.85(1)(e), for the purpose of considering whether to enter into collective bargaining with the following unions in light of Dane County Circuit Court Judge Juan Colas' decision striking down parts of Act 10 as unconstitutional: AFSCME District Council 48; Milwaukee Building & Construction Trades Council AFL-CIO; Federation of Nurses and Health Professionals; Technicians, Engineers and Architects of Milwaukee County, and Association of Milwaukee County Attorneys.**

The Defendants are correct that the *Buswell* court found that listing every single topic of negotiation would be burdensome. 2007 WI 70, ¶¶43-44. That is not what the Plaintiff expects FPAC to have done. FPAC simply needed to tell the public that it proposed to negotiate with its employees' unions. While a public body need not – and should not – reveal information that it has a right to keep secret, the facts that it would consider whether to bargain, who it would bargain with, and what it would bargain about are not the type of strategy and detail that the collective bargaining exemption is designed to protect. Disclosing that information would not have put the county at a disadvantage; the unions on the other side of the negotiations certainly know that the County is bargaining with them.

Under the second prong of the *Buswell* test, the decision to bargain in a post-Act 10 world would be of extraordinary interest to the public. Interest in public sector bargaining in the wake of Act 10 was (and remains) at an extraordinarily high level. It is not necessary here to

recall in detail the massive protests against Act 10, the occupation of Wisconsin's Capitol, the multiple waves of recall elections against elected state officials, the flight of Democratic senators to Illinois, the herculean effort to catalogue all who had signed the recall petitions, and the flurry of litigation seeking to defeat Act 10. When one court (the only court to date to have done so) declared portions of Act 10 unconstitutional, unions around the state began demanding that municipal employers negotiate.[4] Such instances of negotiation, while rare, have generated significant public interest. The Board need only have opened newspapers to find article after article written about public sector negotiations in light of Judge Colás' ruling. In *Buswell*, the act of "several citizens" contacting the Board on a topic was sufficient. 2007 WI 70, ¶¶39, 43 – the interest here is so much greater.

The Defendants complain that the Plaintiff included no evidence in his Complaint "indicating the type of community interest present in the *Buswell* case, where '[s]everal citizens had made the effort to petition the Board regarding whether to put a provision for hiring coaches into the master contract." (Def. Br. 17.) That complaint rings hollow – a plaintiff need not allege every piece of evidence he has in support of his Complaint, and the Plaintiff here has not yet had the opportunity to engage in discovery to learn what interest in Act 10 constituents expressed to members of the Board and FPAC. The Plaintiff alleged that the interest existed; that is sufficient at this stage.

Furthermore, evidence of individual expressions of interest would be unnecessary here; interest in public sector collective bargaining was running so high at that point in time that "predicting and gauging public interest" in the largest County in the State's desire to enter into contract negotiations in violation of Act 10 would have required no effort at all.

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[4] *See, e.g.*, McClatchy News, *Wisconsin Unions Want New Contracts in Wake of Collective Bargaining Ruling*, September 21, 2012, available at http://www.governing.com/topics/public-workforce/mct-wisconsin-unions-want-new-contract.html (last accessed February 20, 2014).

Third and finally, FPAC's actions were not routine, and not likely to be anticipated by the public. Under normal circumstances, entering into collective bargaining with public sector employees is only likely to happen once every year or two, depending on how long the negotiated contracts run. The negotiation for a new contract need not occur on any specific, predictable, timeline either. Sometimes new contracts are negotiated well in advance of the expiration of the existing contract; sometimes a new contract is signed at the eleventh-hour, and occasionally new contracts are not signed until after the old one expired and are implemented retroactively. In short, even in the pre-Act 10 course of public business, precisely when negotiations would begin would be unclear to the public, making it something the government should take care to publicize.

Of course, this meeting occurred in a post-Act 10 world. It is decidedly not routine to negotiate with a decertified union or on topics prohibited by law. The County had previously been abiding by Act 10's requirements. How could the public have possibly anticipated that the County would suddenly decide to violate them? How could such flaunting possibly be considered "routine"? How could FPAC have believed that the public would have no interest in this decision or that the public could anticipate this move?

If the public had been given proper notice of FPAC's intentions, it would have had all kinds of opportunities to react, opportunities foreclosed by FPAC's secrecy. The news media could have reported and opined on the merits of such negotiations. Civic leaders could have spoken publicly. Community leaders could have organized and rallied support and opposition. Constituents could have called their representatives to express their opinion and attended the meeting to speak out on either side. All of these opportunities were lost because FPAC decided to proceed in secrecy. And that is precisely why they did it.

C. The Exception to the Open Meetings Law for Bodies Engaged in Collective Bargaining Does Not Apply to Deliberating and Voting on Whether or Not to Engage in Collective Bargaining

The Defendants argue that FPAC, during the closed session of its March 14, 2013 meeting, somehow lost its status as a "governmental body" simply because it was *discussing* collective bargaining. (Def. Br. 11-12.) Under this argument, the Open Meetings Law did not even apply to FPAC at this point. This argument should be summarily rejected, as it is disproven by the Defendants' own concessions.

In footnote three, the Defendants concede that "[s]uch multi-purpose bodies *must still comply* with the open meetings law, including requirements for convening in closed session, when 'meeting *for the purpose of forming negotiating strategies* to be used in collective bargaining.'" (Def. Br. 12, n. 3 (quoting *Compliance Guide* at 5) (emphasis added).) The Defendants expend considerable effort defending FPAC's actions as *forming negotiation strategies*. (*See* Def. Br. 13-14.)

Furthermore, the Defendants twice acknowledge that the rule is that a body is not "subject to the open meetings law when *conducting* collective bargaining." (Def. Br. 12, see the sentences immediately preceding and following the block quotation (emphasis added).) The Defendants are correct. A group of government representatives that is actively engaging in collective bargaining with its employees' representatives is not subject to the open meetings law, for obvious reasons. When representatives of two sides sit down to negotiate, privacy encourages frank and open discussions of issues. The Legislature would surely not want a governmental entity to accidentally create a "governmental body" subject to the Open Meetings Law if it appoints a two-or-more member team to negotiate.

But FPAC was not "conducting collective bargaining" at its March 14, 2013 meeting; nor was it "meeting for the purpose of collective bargaining," *see* Wis. Stat. § 19.82(1). It was taking advice, deliberating, and deciding on *whether* to engage in collective bargaining at all. It therefore was a "governmental body," and the Open Meetings Law applied to it. In *Buswell*, *amici* raised this issue, but the court declined to decide it,[5] because the record indicated that the board "met to consider approval of the terms reached via collective bargaining" but *did not indicate* that the Board met "for the purpose of collective bargaining." 2007 WI 70, ¶36, n.6. If approving the terms of collective bargaining is not itself done "for the purpose of collective bargaining," it logically follows that deciding to enter into collective bargaining is not, either.

II. ANY ANNOUNCEMENT BY THE BOARD OF ITS INTENTION TO ENTER CLOSED SESSION WAS INADEQUATE, AND WAS NOT MADE PART OF THE RECORD

It is inappropriate to enter evidence tending to disprove the factual allegations in a complaint in support of a motion for judgment on the pleadings, yet the Defendants have attempted to enter video evidence of what occurred at the March 14, 2013 FPAC meeting. As the Defendants correctly related, "A motion for judgment on the pleadings tests the legal sufficiency of a complaint," and "[a]ll facts pleaded . . . are accepted as true." (Def. Br. 5 (citations omitted).) The Defendants' evidence is even more inappropriate because this Court requested in its December 6, 2013 scheduling conference that the Plaintiff not engage in discovery until the motion for judgment on the pleadings had been decided.

The Complaint made two relevant factual allegations: (1) that the meeting's minutes contained no record that an announcement was made informing those present of "the nature of the business to be considered at such closed session, and the specific exemption or exemptions

[5] No other case has even discussed the scope of the collective bargaining exclusion in Wis. Stat. § 19.82(1).

under this subsection by which such closed session is claimed to be authorized" (Complaint, ¶¶53-54); and (2) if such an announcement was made at all, "it was a recitation of the statutory exemption language contained in the noticed agenda" (Complaint, ¶55). Even if the cited video could be considered here, it does not disprove the Plaintiffs' legal claims.

First, the Defendants do not even address the Plaintiff's allegation that the record of the meeting does not reflect that such an announcement was made. The minutes, (Complaint, Exh. B, p. 12) contain no indication that the announcement required by Wis. Stat. § 19.85(1) was made. The minutes contain the same language as the Agenda, and also state that "The Committee went into closed session at 1:50 p.m." upon the motion of Supervisor Haas. Supervisor Haas, as the Defendants admit (Def. Br., 19), is not the presiding officer of FPAC. Even if he were, recording that a motion was made does not record that an announcement was made informing those present of "the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized." *See* § 19.85(1).

Second, even if that the language in the Agenda was read aloud at the presiding officer's direction, that announcement was legally deficient, for the reasons argued above in Section II. It did not inform those present of "the nature of the business to be considered at such closed session," because it did not mention that FPAC would be discussing and voting on entering into negotiations in violation of Act 10.

III. FPAC TOOK UNLAWFUL ACTION IN ITS CLOSED SESSION

Even if FPAC's notice was adequate, even if FPAC used the proper procedure to go into closed session, and even if FPAC's minutes reflect the proper procedure was followed, the Plaintiff's claim that FPAC violated the Open Meetings Law by voting to *enter into collective*

bargaining in closed session remains. While the Defendants say that FPAC could enter into closed session "for purposes of developing collective bargaining negotiation strategies" (Def. Br. 13) and to "confer with legal counsel regarding the deliberation, negotiation or renegotiation of collective bargaining agreements" (Def. Br. 14), the Plaintiff does not complain of those activities being undertaken in closed session.

According to the Defendants, the Plaintiff offered no support for his allegation that "there is no 'valid competitive or bargaining reason that the action of voting to appoint a negotiator to enter into negotiations needs to be secret.'" (Def. Br. 13-14.) However, the Plaintiff was under no obligation to offer a full-fledged legal argument in support of his position in his Complaint. Notice pleading is sufficient. *See United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶21, 349 Wis. 2d 587, 836 N.W.2d 807.

More importantly, the burden is on the Defendants to establish that their actions in closed session were lawful. "The burden is on the governmental body to show that competitive or bargaining interests require closed sessions under Wis. Stat. § 19.85(1)(e)." *State ex rel. Citizens for Responsible Government v. City of Milton*, 2007 WI App 114, ¶10, 300 Wis. 2d 649, 731 N.W.2d 640. If the Defendants want this Court to dismiss this claim, they need to establish, factually and legally, that FPAC did in fact have competitive or bargaining interests that made it necessary to hold the vote to enter into negotiations in secret.

But FPAC had no such interests. FPAC had no bargaining interest in keeping secret the fact that FPAC had decided to bargain. It had no interest in hiding that it was going to bargain with a decertified union. It had no interest in preventing the public from knowing that it was going to negotiate on terms prohibited by Act 10. The fact that they were bargaining – and the topics they were discussing – were not a secret to the people they were bargaining with. It was,

however, kept a secret from the public. Given that FPAC had just authorized unlawful bargaining, it is no surprise they wanted that information kept secret,[6] but that is not a valid interest justifying a closed session under § 19.85.

Furthermore, FPAC had no competitive interest in keeping secret the fact that FPAC had decided to bargain. The whole purpose of unionization is to create a monopoly labor force by eliminating competition. There was neither another group of employees or another employees' representative that the county could have negotiated with who could have benefited unfairly from learning that the county was negotiating with the named unions.

IV. A QUORUM OF THE MILWAUKEE COUNTY BOARD GATHERED AT AN ASSEMBLY MEETING TO GATHER INFORMATION AND SPEAK REGARDING AN ASSEMBLY BILL AFFECTING THEIR GOVERNMENTAL POWERS

A. Any Gathering of a Quorum of Members of a Governmental Body Is Presumed to Be a "Meeting"

Under the Open Meetings Law, a "meeting" is defined as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Wis. Stat. § 19.82(2). The Board is a governmental body. (*See* Wis. Stat. § 19.82(1); Complaint, ¶8.)

The Open Meetings Law also states that "[i]f one-half or more of the members of a governmental body are present, the meeting is *rebuttably presumed* to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." § 19.82(2) (emphasis added); *see Paulton v. Volkman*, 141 Wis. 2d 370, 375, 415 N.W.2d 528 (Ct. App. 1987) ("[I]f the presumption is not rebutted, the provisions of the open meetings law

6 Likewise, it is no surprise that the members of FPAC would prefer to have this case dismissed before they can be compelled to testify under oath as to what happened at the closed session.

require public notice of such a meeting."). One-half or more of the members of the Board were present at the April 10, 2013 legislative committee meeting. (Complaint, ¶25.)

Therefore, the Plaintiff has already established a presumption that a "meeting" of the Board occurred at the April 10, 2013 legislative committee meeting. No notice of that meeting was given (Complaint, ¶32; Answer, ¶32), so the facts alleged establish a valid claim that the Board violated § 19.84, which requires that all meetings of governmental bodies be preceded by appropriate notice.

The Defendants may, as the law permits, rebut this presumption at trial. However, the Defendants cannot do so in the context of a motion for judgment on the pleadings, because such a motion tests the sufficiency *of the complaint itself. Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. If the Complaint establishes a valid claim, as this one does, it cannot be dismissed on the basis that the Plaintiff's claims could, depending upon the evidence at trial, be rebutted.

B. A Quorum of the Board Gathered at the Legislative Hearing to Exercise Its Responsibilities, Authority, Power, or Duties

The Plaintiff alleges that the supervisors who attended the legislative committee meeting did so to gather information relevant to their official functions. For purposes of this Motion, that allegation must be accepted as true. The Defendants argue that this allegation cannot be true because the County Board does not have superintending authority over a committee of the Wisconsin Legislature and could not vote on Assembly Bill 85. However, the Board need not have such authority for its gathering to be a "meeting" under § 19.82(1).

First, nine of the members of the Board present offered testimony at the hearing. (Complaint, ¶30.) It can reasonably be inferred that they did so in furtherance of their public authority as elected members of the Board, because the subject matter of AB 85 directly affected

them as Board members, not as private citizens. *See Grade*, 2004 WI 39, ¶17 (reasonable inferences from facts plead must be accepted as true). Therefore, a quorum of the Board was present at this meeting in order to testify as members of the Board, an exercise of their official powers.

More fundamentally, it is well established that a governmental body has convened a meeting whenever a quorum meets to gather information to be used in carrying out its governmental functions,[7] *i.e.*, information "about a subject over which they have decisionmaking authority." *Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 561, 494 N.W.2d 408 (1993). The *Badke* court made clear that when one-half or more of the members of a governmental body gather for that purpose, that gathering is a "meeting" under the Open Meetings Law "unless the gathering is social or by chance." *Id.* The gathering need not be formal, and there need be no official action taken or even interaction between members of the body. *Id.* at 572. "Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking." *Id.*; *see also State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 80, 398 N.W.2d 154 (1987) ("[W]henever members of a governmental body meet to engage in government business, be it discussion, decision or information gathering, the Open Meeting Law applies if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting.").

Here, one-half or more of the members of the Board attended a meeting of another governmental body in order to gather information about a subject over which they *do* have governmental decision-making ability – the response of the Board to the possible passage of the

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[7] The reason is not – or at least not only – that the body may take some official action, but that the public will be denied an opportunity to know that it is gathering information as a body and may, therefore, be denied an opportunity to monitor or influence the body – either at the unnoticed meeting or otherwise – until the body has already committed to action.

bill in question by the Assembly. The fact that the Board could not vote on AB 85 does not mean they could take no action regarding the bill. They were not passive observers waiting to see what would happen to them. They could discuss the bill. They could organize and offer to testify against it. They could decide to deploy lobbyists to oppose it. They could choose to file a lawsuit seeking to block the law. They could discuss or agree on ways to evade or minimize its impacts on their prerogatives. Whether or not they chose to do any of these things, they could use the information they gathered at the legislative hearing to make that choice.

Although the situation in *Badke* – where members of a parent body attended the meeting of a subsidiary body – is not identical to the situation here, the logic behind the *Badke* decision applies here with equal force. Imagine that instead of attending in person these ten members of the Board had gathered in a committee room at the Milwaukee County Courthouse to watch the hearing coverage online via WisEye.[8] There would be no doubt that the Open Meetings Law would require such a meeting to be noticed, because information gathering on topics relevant to the county is among the responsibilities of the Board. The Open Meetings Law presumes that all gatherings of a quorum of a governmental body be open so that the public may obtain "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business." Wis. Stat. § 19.81(1).

The decision of the Court of Appeals in *Paulton v. Volkman* does not control here. First, the procedural postures are different. The circuit court in *Paulton* made factual findings that rebutted the presumption that a meeting occurred. 141 Wis. 2d at 378. The court of appeals' decision concluded that those factual findings were not clearly erroneous. *Id.* Here, there are as of yet no factual findings to rebut the presumption that a meeting occurred.

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[8] WisEye provides online and cable-access network to the activities of state government. *See* http://www.wiseye.org/AboutWisconsinEye/Mission.aspx (last accessed February 20, 2014).

More importantly, the facts found in *Paulton* are distinguishable in a meaningful way from the facts alleged here. The *Paulton* court "found that the Phelps school board members did not receive information, hear arguments, or otherwise exercise the board's responsibilities, authority, power, or duties. *Id.* at 375. The *Paulton* court also found that the board members in attendance did not speak in their official capacity and did not "encourage[], endorse[], or approve[] the [proposal under discussion]." *Id.* at 375-76. Here, the supervisors received information and testified formally as to AB 85. It can further be reasonably inferred that they heard arguments for and against AB 85 and either opposed or supported AB 85 when they spoke.

In this case, members of the public were entitled to know that a quorum of the Board had decided to testify on AB 85 en masse. They were entitled to know that the Board had gathered together to receive information about a legislative effort to limit the Board's authority and compensation – and to which a number of responses were possible. They were entitled to observe what their representatives would say, what they would learn, and whether they would interact (by, for example, caucusing at the hearing).

The meeting was not social. It was not by chance. It involved a subject about which the Board could – and did – take action. *Badke* applies. The Open Meetings Law was broken.

CONCLUSION

For the reasons stated above, the Plaintiff respectfully requests that this Court deny the Defendants' Motion for Judgment on the Pleadings and permit discovery to commence.

Respectfully submitted,
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