STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

CHRIS JURRIANS, GAIL SCHUILING, LILA DELINE, RINA SALA-BAKER, and TOM NORTON

Plaintiffs,

v.

KENT INTERMEDIATE SCHOOL DISTRICT, et al.

Defendants.

Case No. 10-12758-CL

Hon. James R. Redford

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BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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Introduction

The central issue in this case is readily identified. In 1994, the Michigan Legislature enacted MCL 423.215(3) of the Public Employment Relations Act (PERA), which was to protect the public from school boards improvidently capitulating to school employee union demands on certain issues, including whether noninstructional services could be privatized. In the instant case, there is a clear violation of MCL 423.215(3). The question is whether Plaintiffs as taxpayers and members of the public can enforce that law, or whether they must rely on the offending parties — either the school districts that signed the collective bargaining agreement or the school employee unions — to do it for them. Plaintiffs contend they can enforce the law.

Facts and Procedure

On or about March 8, 2010, Defendant Kent Intermediate School District (KISD) and nine school districts within KISD entered into a "Collaborative Settlement Agreement" with Defendant Kent County Education Association and the various Defendant local education associations that serve as the certified bargaining representatives for the school districts' employees. Essentially, the agreement operates as an addendum to the existing collective bargaining agreements between the individual districts and their corresponding school employee unions. One of the provisions of this agreement purports to prohibit privatization. It states:

> **Privatization:** All districts agree not to privatize any KCEA/MEA unionized services for the life of the agreement.

Complaint Exhibit F. Some of the Defendant associations represent school employees who provide noninstructional services. The agreement is to sunset at the end of the 2010-2011 school year, at which time the collective bargaining agreements' pre-addendum language would be restored.

Defendant schools now state that "the Association and the Schools — agree that the privatization provision is not enforceable." Defendant Schools' Motion for Summary Disposition at 9. Interestingly, nowhere in Defendant associations' motion to dismiss do the associations concede the same.[1] In fact, in the June 2010 MEA Voice, the no-privatization clause was highlighted in an article discussing the Collaborative Settlement Agreement. Kent County districts, employees collaborate, MEA Voice, June 2010 at 22.[2]

Defendant schools also contend they agreed to the associations' requested no-privatization language solely because the districts were not planning to privatize during the course of the agreement anyway: "When they entered into the Collaborative Agreement, none of the Schools had any intention of privatizing non-instructional services during the one year term of the contract." Defendant Schools' Motion for Summary Disposition at 2. Since the signing of the agreement, however, a number of the districts have held elections. All nine of the local school districts — Byron Center, Comstock Park, Godfrey-Lee, Godwin Heights, Grandville, Kenowa Hills, Lowell, Northview, and Rockford — had a school board election on May 4,

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[1] An interview with the Defendant associations' counsel is published on the website of the Michigan Education Association (the parent union of the Defendant associations). The interview indicates that counsel is aware that collective bargaining over subcontracting of noninstructional support staff is impermissible:

> Are there any subjects prohibited during negotiations?
>
> Yes. Public school (K-12) employees can't negotiate the policyholder for group health insurance programs. . . . Other prohibited topics include the subcontracting of noninstructional support services, the composition of site-based decision-making committees, the use of volunteers, or pilot or experimental programs. All of these were added to PERA as Public Act 112 in 1994 and they're limited to public school employees.

http://www.mea.org/legal/10questions_with_Art.html (last visited February 7, 2011). This footnote is not meant as a criticism of Defendant associations' counsel; rather, it is included to show that the all of the parties are aware that privatization of noninstructional support services cannot be part of a collective bargaining agreement. Of course, the undersigned recognizes that a party is not bound by its counsel's out-of-court statements to a lay audience, and that the Defendant associations are thereby free to make any proper argument about the applicability and scope of MCL 423.215.

[2] http://www.mea.org/voice/2010June/2010June-completevoice.pdf.

2010.[3] In that same election, Kenowa Hills and Northview presented millage proposals to the voters. Comstock Park had a millage proposal in the August 3, 2010, primary election.[4] Comstock Park has two bonding proposals on the February 22, 2011, ballot.[5] Another round of board elections will occur on May 3, 2011.[6]

Plaintiffs filed the instant action on December 16, 2010. They seek both a declaration that the illegal no-privatization provision is without effect and a permanent injunction against the inclusion of similar provisions in future collective bargaining agreements.

Defendant school districts filed a motion for summary disposition under MCR 2.116(C)(4) and (C)(7), alleging: (1) Plaintiffs lack standing; (2) the Michigan Employment Relations Commission (MERC) has exclusive jurisdiction; and (3) Plaintiffs' complaint should be characterized as an unfair labor practice claim, which carries a six-month statute of limitations. The Defendant associations make the same arguments, but also cite MCR 2.116(C)(5). Defendants' arguments will be addressed in turn throughout this brief.

Argument

1. Standing test

The Michigan Supreme Court recently issued an opinion, *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010), that sought to clarify the correct standing requirements for cases filed in Michigan courts. This decision fundamentally altered the rules for standing and rendered obsolete many precedents on standing.

Lansing Schools is the latest in a decade-long string of decisions that exposed competing views on when Michigan courts could hear cases. In *Lee v Macomb Bd of Comm'rs*, 464 Mich 726

[3] http://www.electionmagic.com/archives/mi/2010/mayspec/K41results/K4100101sum.htm
[4] http://www.electionmagic.com/archives/mi/2010/augprim/K41results/K4100101sum.htm
[5] https://www.accesskent.com/appImages/elections/2011/02222011090637P.pdf
[6] https://www.accesskent.com/appImages/elections/2011/05032011040751P.pdf

(2001), the Michigan Supreme Court adopted the federal standing requirements, which are:

> [T]hat the plaintiff show (1) an injury-in-fact, meaning the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) causality, meaning that the injury is "fairly trace[able]" to the challenged conduct; and (3) redressability, meaning that it is "likely" that a favorable decision would "redress" the injury.

Lansing Schools, 487 Mich at 360 n 7 (citing *Lee*, 464 Mich at 739).

Among the cases to which this federal test was applied were two 4-3 decisions issued on the same day at the end of the 2007 court term: *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280 (2007), and *Rohde v Ann Arbor Public Schools*, 479 Mich 336 (2007). At issue in *Nestle Waters* was the question of whether the Legislature through MCL 324.1701 had expanded the class of persons who could sue to protect the environment. The statute, in pertinent part, states:

> [A]ny person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

The Michigan Supreme Court held that the Legislature could not confer standing on parties who did not meet the federal constitutional requirements. *Nestle Waters*, 479 Mich at 302-03. In *Rohde*, the Michigan Supreme Court rejected the concept of taxpayer standing. The statute in question in that case, MCL 129.61, permits "any party . . . paying taxes to [a] political unit" to "institute suits or actions in law or in equity on behalf of the treasurer of such political subdivision" for the "recovery of funds or moneys misappropriated or unlawfully expended." Both *Nestle Waters* and *Rohde* were explicitly overruled in *Lansing Schools*. *Lansing Schools*, 487 Mich at 371 n 18.

In *Lansing Schools*, the Michigan Supreme Court held that a party could show standing by: (1) showing "there is a legal cause of action"; (2) meeting "the requirements of MCR 2.605";

(3) showing "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large"; or (4) showing "the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*. at 372.

The specific issue in that case was whether teachers had standing to sue for a violation of MCL 380.1311a, which indicates a school district "shall expel [a] pupil from the school district permanently" if the student assaults a school employee and is in the sixth grade or above. The plaintiffs were four teachers who stated they had been victims of assaults where the assaulting students were not expelled. The plaintiffs sought "a writ of mandamus and declaratory and injunctive relief." *Id*. at 354.

The court did not address the first standing category — "legal cause of action" — because unlike MCL 324.1701, the provision at issue in *Nestle Waters*, the statute did not explicitly give "any person" or any subgroup the right to enforce it. *Lansing Schools*, 487 Mich at 373. With regard to declaratory judgments, the Michigan Supreme Court indicated "that meeting the requirements of the court rule governing declaratory actions was sufficient to establish standing." *Id*. at 357. But the court did not analyze this question and instead remanded it to the Court of Appeals for consideration in the first instance. *Id*. at 373.

The Michigan Supreme Court found that the teachers satisfied the third standing test. Because "students are expelled for assaulting employees of the school, and not the citizenry at large, it is apparent from the statute that the plaintiff-teachers have a substantial interest in the enforcement of this provision distinct from the general public." *Id*. at 374. The court held that the legislative history of the statute confirmed this. *Id*. at 375. The fourth test was not addressed.

2. Application of *Lansing Schools* in the instant case

MCL 423.215, the statute in question here, in pertinent part states:

(3) Collective bargaining between a public school employer and a bargaining

representative of its employees shall not include any of the following subjects:

> . . .
>
> (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; . . .
>
> . . .
>
> (4) . . . [T]he matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

Plaintiffs principally rely on the first and fourth tests from *Lansing Schools* in order to satisfy the requirements for standing and to seek declaratory and injunctive relief.

a. <u>MCL 600.2041 provides a "legal cause of action"</u>

Under the first Lansing Schools test, MCL 600.2041 provides a legal cause of action. The statute states:

> Every action shall be prosecuted in the name of the real party in interest; . . . and further
>
> . . .
>
> (3) an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in . . . the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside.

Id.[7]

Defendant schools contend there is no expenditure here. In support of this view, they correctly note that school districts are not under a duty to privatize and that even if the no-privatization clause were removed, the school districts might spend the same amount of money. Defendants are incorrect, however, to maintain that this means there is no expenditure at issue.

[7] MCR 2.201(B)(4) is the Michigan Court Rule equivalent to this MCL 600.2041(3) and allows for the same suits to be brought.

The meaning of "expenditure" was addressed in *House Speaker v Governor*, 443 Mich 560 (1993), where the Michigan Supreme Court was faced with two nonprofits' challenge to Governor Engler's use of an executive order to restructure the Department of Natural Resources. The nonprofits claimed the "new" DNR was unconstitutionally formed. The court looked at whether MCL 600.2041 provided standing and held that accepting the pleadings as true, the nonprofits were challenging an illegal expenditure:

> [I]t fairly can be said that this lawsuit was brought to prevent the illegal expenditure of state funds. For purposes of determining standing, we must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Therefore, for this limited purpose, we assume that the Governor had no authority to create a "new" DNR, and any money spent by such an agency would be done illegally. As a result, we find that the plaintiffs can be said to have brought this lawsuit to prevent the expenditure of state funds by a group having no lawful authority to make such expenditures.

Id. at 573 (citation omitted).

Just as in *House Speaker*, where the improper formation of a state agency would result in illegal expenditures of state funds by that agency, the improper formation of the Collaborative Settlement Agreement leads to a collective bargaining contract that necessarily involves the illegal expenditure of state funds on school employee services. The fact that Plaintiffs seek the targeted relief of striking the offending no-privatization provision, as opposed to requesting that the collective bargaining agreements be struck in their entirety, does not prevent suit here. Ultimately, in other words, Plaintiffs are *not* contending that Defendant schools have a duty to privatize; rather, Plaintiffs contend that a collective bargaining agreement containing illegal provisions may be challenged by property-taxpayers as an illegal expenditure of state funds under MCL 600.2041.

Defendant schools cite a number of obsolete standing cases for the proposition that "[i]t is well-settled that a 'taxpayer suit' may only be brought when the alleged 'illegal expenditure of state funds' subjects the plaintiff-taxpayers to substantial injury or loss through increased

taxation." Defendant Schools' Motion for Summary Disposition at 6. In support, Defendant schools cite *Menendez v Detroit*, 337 Mich 476, 482 (1953) ("[I]t is clearly recognized that prerequisite to a taxpayer's right to maintain a suit of this character against a unit of government is the threat that he will sustain substantial injury or suffer loss or damage as a taxpayer, through increased taxation and the consequences thereof.") .

Defendant schools fail to address the implications of *Menendez*'s being decided in 1953, ten years before MCL 600.2041 became effective. Defendant schools do cite five Michigan Court of Appeals cases that postdate the passage of MCL 600.2041, but none of them explore the impact of the passage of that statute on *Menendez*. See *Killeen v Wayne County Road Commission*, 137 Mich App 178, 190 (1984) (citing *Menendez* with no mention of MCL 600.2041); *Rayford v Detroit*, 132 Mich App 248, 258 (1984) (citing *Menendez* with no mention of MCL 600.2041); *Grand Rapids v Kent County*, 96 Mich App 15, 24 (1980) (citing *Menendez* with no mention of MCL 600.2041); *Kaminskas v Detroit*, 68 Mich App 499, 501 (1976) (citing both *Menendez* and MCL 600.2041, but not discussing whether the statute broadens the class of taxpayers who have standing to sue); *Westen v Allen Park*, 37 Mich App 121, 123 (1971) (citing *Menendez* with no mention of MCL 600.2041). Collectively, Defendant schools' cases stand for the proposition that a statute, MCL 600.2041, cannot expand standing past the constitutional requirements set forth in *Menendez*. But the very argument that the Legislature could not expand standing was just rejected in *Lansing Schools.*

Thus, to have standing under MCL 600.2041, Plaintiffs need not meet any test or requirement not found in the statute itself. The *Menendez* line of cases seeking to impose a constitutional minimum is no longer controlling law.[8]

[8] *Menendez* itself remains valid. The later cases erred in not realizing that *Menendez* could effectively be *(Note continued on next page.)*

Defendant schools may seek refuge in language from *Lansing Schools* about pre-*Lee* cases. Such an attempt would fail. Justice Cavanagh, who wrote the majority opinion, stated in Section C, "Stare Decisis," that *Lansing Schools* merely returned the law to "the *status quo ante*" — meaning the period before *Lee* and its progeny.[9] 487 Mich at 369 n 15. Later in Section D, "the Proper Standing Doctrine," he stated that "Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing." *Id*. at 372. Neither of these statements gives blanket approval to all standing cases that predate *Lee*. Instead, they are an assertion that pre-*Lee* case law is in harmony with the decision in *Lansing Schools*. Whether this assertion is entirely accurate is unimportant; what matters is that the Michigan Supreme Court announced its preference for the *Lansing Schools* tests, rather than the federal test set forth in *Lee* and its progeny. The *Menendez* line of cases falls squarely within the *Lee* camp and, again, is no longer applicable.

b. <u>Statutory scheme and legislative intent</u>

The fourth *Lansing Schools* test provides a second basis for Plaintiffs' standing. Understanding the Legislature's intent in MCL 423.215 requires a review of some basic federal labor concepts, because PERA, which was passed in 1965, was modeled after the National Labor Relations Act (NLRA), itself enacted in 1935.

Under the NLRA, there are three types of bargaining subjects:

> The potential topics of collective bargaining fall within three broad classifications: mandatory subjects, permissive subjects, and illegal subjects. Mandatory subjects, over which both the union and the employer are obligated to bargain in good faith, are those specified in Section 8(d) of the NLRA: "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d).

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modified by the enactment of MCL 600.2041.

[9] The undersigned recognizes that Section C of Justice Cavanagh's *Lansing Schools* opinion garnered only three votes and is therefore not part of the court's holding. Nevertheless, Justice Cavanagh's discussion in Section C probably informs his discussion in Section D, which is also set out in the main text, and which *was* part of the court's holding.

> Permissive subjects fall outside the scope of Section 8(d), but may nevertheless touch and concern the relationship of the employer to the union or to the employees the union represents. Although permissive subjects are appropriate topics for negotiation between the union and the employer, an employer or a union commits an unfair labor practice by conditioning the consummation of a collective bargaining agreement upon the inclusion of a term covering a permissive subject of bargaining. The Supreme Court has reasoned that "such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." Illegal subjects are simply those proscribed by federal or, where appropriately applied, state law.

The Idaho Statesman v NLRB, 836 F2d 1396, 1400 (DC Cir 1988) (some citations omitted). The Fifth Circuit elaborated on the concept of an illegal subject of bargaining under the NLRA:

> Illegal subjects cannot be bargained over, and any party that insists upon inclusion of such a provision as a condition of a [sic] agreement has committed an unfair labor practice in violation of § 8(a)(5) or § 8(b)(3). Examples of illegal subjects are certain forms of union security prohibited by the Act such as closed shops and preferential hiring (except under certain circumstances in the building and construction industry). In addition, union shop, agency shop, maintenance-of-membership agreements, check-offs which do not meet the statutory requirements, or any other practice forbidden by the Act is an illegal subject and cannot amount to a mandatory or permissive subject of bargaining.

NLRB v BASF Wyandotte Corp, 798 F2d 849, 852 n 1 (5th Cir 1986) (some citations omitted).

In the federal courts' consideration of contracting out, two separate duties have arisen. In some instances, the federal courts have found the question of contracting out to be a mandatory subject of bargaining. In others, the federal courts have held there is a mandatory duty to bargain about the effects of certain managerial decisions.

In *Fibreboard Paper Products Corp v NLRB*, 379 US 203 (1964), the United States Supreme Court examined "whether the 'contracting out' of work being performed by employees in the bargaining unit is a [mandatory] subject of collective bargaining" of the NLRA. *Id*. at 204-05. Fibreboard, which ran a manufacturing plant, was "concerned with the high cost of its maintenance operation," and it undertook "a study of the possibility of effecting cost savings by engaging an independent contractor to do the maintenance work." *Id*. at 206.

The study showed that "substantial savings could be effected by contracting out the work." *Id*. Due to this study, the company informed its maintenance union that negotiations to extend their collective bargaining agreement would be "pointless." *Id*. The union members were terminated and the independent contractor started work.

The United States Supreme Court held that the type of contracting at issue in *Fibreboard* — "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" — was a mandatory subject of collective bargaining:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

Id. at 213.

The United States Supreme Court revisited *Fibreboard* in *First National Maintenance Corporation v NLRB*, 452 US 666 (1981). *First National* concerned whether the decision to close a portion of a business was a mandatory subject of collective bargaining. *Id*. at 667. In place of the absolute rule from *Fibreboard*, the United States Supreme Court created a balancing test:

> [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id. at 679. The court held that even if there was no mandatory duty to bargain about the decision to shut down a portion of an enterprise, "[t]here is no doubt that petitioner was under a duty to bargain about the results or effects of its decision to stop the work." *Id*. at 677 n 15.

Thus in the private sector, decisions that might lead to employee termination can almost always be challenged in some manner. Some cases will be so close to *Fibreboard* that it will still apply, and the remainder will be subject to the *First National* balancing test. Even if there is not a mandatory duty to bargain about whether to contract out, there will often be a mandatory duty to bargain about the effect of management decisions.

Collective bargaining has been a fixture in the private sector since the United States Supreme Court upheld Congress' power to enact the NLRA. *NLRB v Jones & Laughlin Steel Corp*, 301 US 1 (1937). But the NLRA specifically exempted "any State or political subdivision thereof" from its ambit. 29 USC § 152(2).

There is nothing that requires a state to allow public-sector collective bargaining. *Smith v Arkansas State Highway Employees Local 1315*, 441 US 463, 464-65 (1979) ("First Amendment is not a substitute for the national labor relations laws . . . [and it] does not impose any affirmative obligation on the government to listen, to respond or . . . to recognize [a public-sector union] and bargain with it."). Some states, such as North Carolina, still prohibit public-sector bargaining altogether. NC Gen Stat § 95-98.

Prior to 1963, public-sector collective bargaining was illegal in Michigan. The Michigan Supreme Court has described the state of mind in 1941 regarding public-sector collective bargaining: "The thought of strikes by public employees was unheard of. The right of collective bargaining, applicable at the time to private employment, was then in its comparative infancy and portended no suggestion that it ever might enter the realm of public employment." *Civil Service Commission for Wayne County v Wayne County Board of Supervisors*, 384 Mich 363, 372 (1971). A series of Attorney General Opinions also prohibited public-sector collective bargaining. OAG,

1941-1942, p 247 (July 25, 1941);[10] OAG 1947-1948, No 29, p 170 (June 6, 1947); OAG 1947-1948, No 496, p 380 (August 12, 1947); OAG 1951-1952, No 1368, p 205 (March 21, 1951).

The 1963 Constitution gave the Legislature the power to enact a public-sector collective bargaining law. Const 1963, art 4, § 48. The passage of PERA did not happen, however, until a massive shift in the political landscape occurred:

> In the 1964 election, President Lyndon Johnson won in a landslide, and his coattails helped many other Democratic candidates. Michigan Democrats won large majorities in both houses of the state legislature in the 1964 election, their first majorities in either chamber since 1937-1938, and enactment of a prounion public sector bargaining law was one of the consequences of those majorities.

Gregory M. Saltzman and Shlomo Sperka, Public Sector Collective Bargaining in Michigan: Law and Recent Developments in Collective Bargaining in the Public Sector: the Experience of Eight States (Joyce M. Najita & James L. Stern eds. 2001) at 107-08.[11] PERA "was one of the first" public-sector bargaining laws in the United States. *Id*. at 108.

In *Abood v Detroit Board of Education*, 431 US 209 (1977), the United States Supreme Court discussed "the important and often-noted differences in the nature of collective bargaining in the public and private sectors." *Id*. at 227. These differences are:

> A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market. Municipal services are typically not priced, and where they are they tend to be regarded as in some sense "essential" and therefore are often price-inelastic. Although a public employer, like a private one, will wish to keep costs down, he lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases. A public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment.
>
> The government officials making decisions as the public "employer" are less likely to act as a cohesive unit than are managers in private industry, in part because different levels of public authority [—] department managers, budgetary officials, and legislative bodies [—] are involved, and in part because each official

[10] The Attorney General did not assign numbers to opinions at that time.

[11] An electronic copy of this book is available at bit.ly/e2OFoa.

> may respond to a distinctive political constituency. . . .
>
> Finally, decisionmaking by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters[:] taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients. . . . It is surely arguable, however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector.

Id. at 227-29 (footnote omitted and emphasis added).

Before the passage of MCL 423.215, the Michigan Court of Appeals held that contracting out was a mandatory subject of collective bargaining under PERA. *Van Buren Public School Dist v Wayne County Circuit Judge*, 61 Mich App 6 (1975). In *Van Buren*, a school district had privatized its bus service, and the court held that the district was required to bargain with the union over the decision. The court relied principally on *Fibreboard*, explaining:

> The merits of [the district]'s decision to subcontract are not so clear as to eliminate the need for discussion. Union input might reveal aspects of the problem previously ignored or inadequately studied by [the district]. The union may well be able to offer an alternative to the one chosen by [the district] which would fairly protect the interests and meet the objectives of both.

Id. at 26.

In *Bay City Education Association v Bay City Public Schools*, 430 Mich 370 (1987), the Michigan Supreme Court examined whether a school district's decision to terminate the operation of a special education center and transfer the responsibilities for it to an intermediate school district constituted contracting out. Adopting an approach similar to that of the United States Supreme Court in *First National*, the Michigan Supreme Court held the decision was within the "management rights of the local school board," but that the district was "subject to the

duty to bargain in good faith regarding the effect of the decision on unit employees." *Bay City Education Association,* 430 Mich at 372. Whether a particular decision was "within the scope of management prerogative" would "turn on the particular facts of each case." *Id*. at 376.

The court discussed *Fibreboard*, *Van Buren*, and *First National* and essentially made PERA case law mirror the federal courts' NLRA rulings. Contracting out could be a mandatory subject of bargaining in some circumstances, and even when it was not, school districts often had a duty to negotiate over the effect of decisions that led to layoffs or terminations. Either way, the union could file unfair labor practice charges that could hinder and delay attempts to save money.

1994 PA 112 (Act 112), which created MCL 423.215, came during a tumultuous time in public education in Michigan. In July 1993, local property taxes were eliminated, decreasing school funding by $7 billion per year.[12] Saltzman and Sperka claim that with the loss of local property tax revenues, school boards felt they would "lose the power to determine the overall size of their budgets" and therefore "would need more flexibility in allocating within their fixed budgets." Public Sector Collective Bargaining in Michigan at 119. Removing privatization "from the scope of bargaining" would help "gain the flexibility."[13] *Id*.

The passage of Act 112 was contentious. The law passed only when a bedridden legislator was brought in to vote for it:

> In order to obtain the critical nineteenth Senate vote needed for passage, the Republicans set up a hospital bed in the lieutenant governor's office near the Senate chamber, where a Republican senator who had been absent for two months due to medical problems could rest until they were ready to hold the vote.

Id. at 120.

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[12] http://www.senate.michigan.gov/sfa/Publications/JointRep/FINPROPA/95COMP.HTML (last visited February 9, 2011).

[13] Just this last year, all of the new privatization contracts that were in their first year were estimated to cumulatively save schools $16.7 million. http://www.mackinac.org/archives/2010/s2010-06.pdf at 3 (at 9 of .pdf). It is now the case that 269 of the 551 school districts privatize at least one of the three major noninstructional services — food, custodial, or transportation. *Id.*

The passage of Act 112 also led to a court challenge. *Michigan State AFL-CIO v Employment Relations Commission*, 453 Mich 362 (1996). One claim was that MCL 423.215(3) and (4) "impinge on public employees' freedom of speech." *Id*. at 380. In response, the Michigan Supreme Court noted that "[i]f these subsections denied public school employees the right to voice their concerns over [the covered subjects], they would violate the First Amendment." *Id*. But the court noted that "nothing in the subsections prohibits discussion," even though the public employer is not duty-bound to listen. *Id*. The Michigan Supreme Court explained that in MCL 423.215(3) and (4), "the Legislature simply has removed the statutory requirement that public school employers listen to their employees and instructed the employers not to collectively bargain with regard to those subjects." *Id*. (emphasis added). The court explained that the prohibited subjects were in effect "illegal subjects of collective bargaining." *Id*.

Defendant schools imply that the language of MCL 423.215(4) (quoted earlier) somehow gives them the discretionary authority to determine whether to include a prohibited subject of bargaining in a collective bargaining agreement — a sort of "local control" argument. This would be a gross misreading of the statute. The statute says that the matters listed therein are prohibited subjects of bargaining and "are within the sole authority of the public school employer to decide." In other words, this portion of the law prevents the issue of contracting out (as a prohibited subject of bargaining) from ever being either a mandatory or permissive subject of bargaining and provides the public school employer the freedom to privatize noninstructional services at will.[14] The language most assuredly does *not* give the Defendant schools the discretion to include or exclude the statute's prohibited subjects in a collective bargaining agreement.

Saltzman and Sperka (director of what is now MERC from 1983 to 1998), indicated that in

[14] Obviously, the prohibition in the statute would also prevent the *effects* of subcontracting from being a mandatory or permissive subject of bargaining.

passing Act 112, the Legislature sought to limit schools' ability to accede to union demands:

> The other important features of Act 112 . . . were restrictions on the scope of bargaining in public education. The intent of the legislature in imposing these restrictions . . . was to enhance school management's power in dealing with unions. Ironically, their view was that the best way to do this was to limit management's negotiating authority, based on the assumption that administrators had to be protected against their own inclination to grant union demands.

Public Sector Collective Bargaining in Michigan: Law and Recent Developments at 124 (emphasis added).

This is not surprising when one considers the unique qualities related to public-sector bargaining identified in *Abood*: school boards lacking the "important discipline against agreeing to increases in labor costs that in a market system would require price increases," and the public school employees' ability "as part of the electorate" to "affect the decisions of government representatives who sit on the other side of the bargaining table." In passing Act 112, the Legislature was clearly aware that while most decisions could be left to the local school boards, some were so important that they had to be removed from school boards' control. Privatization of noninstructional services was one of those issues.

This exposes the flaw in Defendant schools' argument that the courts have "implicitly recognized that parties may agree to bargain over prohibited subjects and include them in their agreements, finding that if they choose to do so, any such provision in the agreement will simply not be enforced." Defendant Schools' Motion for Summary Disposition at 6 (emphasis in original). The Defendants' argument assumes the district can make "meaningless" public promises and then have the brazenness to ignore them if circumstances change. How would a newly elected school board, for instance, reverse this explicit contract language — just ignore it in the hope the union will not seek to enforce it? Or will a Defendant school district sue itself?

It strains credulity to imagine the Legislature, which did not trust school boards to

bargain over privatization of noninstructional services, intended the same school boards to be the only entity that could enforce this statutory provision. MCL 423.215, passed just after voters approved the school finance reform known as Proposal A of 1994, was created to endow school districts with enhanced spending flexibility in an era when they would have less recourse to local property tax hikes to increase their revenues. The statutory scheme and the history of the period indicate the Legislature believed that school district decisions that undermined spending flexibility — like bargaining away the right to privatize — could lead to questionable spending decisions that misallocated taxpayer money and affected the quality of the district's education services. Clearly, the Legislature meant to protect the people's interests in affordable and effective schools. Individual citizens are hence the logical parties to enforce this statute.

To argue otherwise is to ignore the fact that MCL 423.215 was informed by nearly three decades of experience with public school collective bargaining in Michigan. This statutory provision was a landmark reversal of decades of labor law, both state and federal, related to contracting out. No longer was public school privatization or its effects a mandatory subject of bargaining; it was now prohibited altogether. This watershed decision was not hortatory language; it was a major legislative decision that can be enforced by the people.

c. Declaratory judgment and the schools' intent

Defendant schools contend that declaratory judgment is inappropriate since they had no intention to privatize when they entered into the Collaborative Settlement Agreement. Defendant schools argue that their certainty about their privatization is what made them willing to include the no-privatization clause in the agreement. While this may well have been the Defendant schools' intent on March 8, 2010, each school district has had a school board election since the agreement commenced. Since each election essentially creates a new board, there could not in fact have been any "certainty" about the board's future intention. Moreover, the schools' intent

on March 8, 2010 — or any day — is irrelevant; MCL 423.215 was meant to allow privatization at any time in order to protect the taxpayers' investment, even if the decision to privatize inevitably rests with the individual districts. Defendant schools have violated the legislative command by including an illegal subject of bargaining in the various collective bargaining agreements at issue here. That means there is an actual controversy, as required under MCR 2.605, as long as the illegal subject remains in the collective bargaining agreement.

3. MERC jurisdiction and the statute of limitations

PERA does not provide an explicit cause of action for violations of MCL 423.215(3). Other portions of the law, such as MCL 423.202a, explicitly allow suits by either the school district or a bargaining representative to punish strikes and lockouts, but does not mention violations of MCL 423.215. MCL 423.216 allows "violations of MCL 423.210" to be brought as "unfair labor practices" before MERC, but does not mention violation of MCL 423.215.

Both Defendant schools and Defendant associations seek to characterize Plaintiffs' claim as an unfair labor practice charge that must be brought at the Michigan Employment Relations Commission (MERC). Both contend that MERC has exclusive jurisdiction over unfair labor practice claims and cite cases like *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104 (1977), in support.

But neither addresses the language of MCL 423.216, which limits "unfair labor practices" to violations of MCL 423.210. MCL 423.215 was implemented after both MCL 423.210 and MCL 423.216; notably, the Legislature did not seek to use the MERC framework for unfair labor practices for violations of MCL 423.215.

The reason for this is clear. Before MCL 423.215, PERA dealt entirely with matters where the public employer and public employee were at odds. Traditional labor issues like strikes and wages were meant to follow the NLRA model, and MERC was meant to have exclusive

jurisdiction over them. But MCL 423.215(3) is different. Violations of this statute do not involve a labor-management dispute; rather, they involve joint illegal actions by management and labor.

Thus, there is no need for MERC expertise. A court's task in remedying violations of MCL 423.215(3) is straightforward. If a collective bargaining agreement illegally contains a prohibited subject, that provision can be declared unenforceable and an injunction entered to prevent further violations. Discussions of MERC and the six-month statute of limitations are misplaced here.

Plaintiffs are seeking to strike illegal language from contracts — the collective bargaining agreements — meaning that the six-year statute of limitations from MCL 600.5807(8) applies. Plaintiffs' action was brought within this period.

Conclusion

For the reasons stated above, Plaintiffs request that this Court deny Defendants' motions for summary disposition.

Respectfully submitted,

By: _____

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