STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
COUNTY OF WAYNE

ANGELA STEFFKE,
REBECCA METZ, and
NANCY RHATIGAN,
individuals,

Plaintiffs,

-v-

Case No. 13-002906-CK
Hon. Daphne Means Curtis

TAYLOR FEDERATION OF TEACHERS, AFT 1085,
an unincorporated labor union,
TAYLOR SCHOOL DISTRICT,
a public school district, and
TAYLOR PUBLIC SCHOOL BOARD OF EDUCATION,
a public school board,

Defendants.

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PLAINTIFFS' COMBINED MOTION AND BRIEF FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Now come Plaintiffs, by and through their attorneys, and state the following:

1. For the reasons set forth in the accompanying brief, Plaintiffs request that this Court grant them summary disposition as authorized by MCR 2.116(C)(10) and award

them one or more of the following forms of relief:

a) A declaration that the Union Security Agreement is void for lack of consideration;

b) A declaration that the Union Security Agreement is void for binding successor school boards to a specific, unalterable policy;

c) A declaration that the Union Security Agreement cannot have an effective term longer than the Collective Bargaining Agreement, along with a reformation of the Union Security Agreement that corrects the length of the Union Security Agreement so that it equals the term of the Collective Bargaining Agreement;

d) A declaration that the Union Security Agreement's term cannot exceed the three-year contract bar; and/or,

e) Any other relief that this court deems just and equitable.

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

INTRODUCTION AND RELEVANT FACTS

The relevant facts of this matter are straightforward and uncontested. The Plaintiffs are teachers employed by the defendant Taylor School District, which is governed by the defendant Taylor Public School Board of Education (the "School Board"). The Plaintiffs, as employees, are represented by a labor union bargaining representative, the defendant Taylor Federation of Teachers, AFT 1085 (the "Union"). On or about February 11, 2013, the School Board and the Union entered into a union security agreement (the "Union Security Agreement"). Ex. A. The Defendants

characterized this Union Security Agreement as a "separate," second "collective bargaining agreement." *Id*. at page 3, section 2. A union security agreement typically compels the represented employee to pay either dues or agency fees to the union and requires the employer to fire the employee at the union's request if the employee does not pay these dues or fees. Such a termination provision is present here. *Id*. at section 1(b)(v). Union security agreements are usually a clause within the general mandatory collective bargaining agreement entered into by the employer and the union; and the security clause is effective for the same length of time as the collective bargaining agreement of which it is a part.

In this matter, however, the Defendants' ten-year Union Security Agreement was separate from their four-year collective bargaining agreement (the "CBA," Ex. B. *Id.* at page 3, Section H). The CBA was ratified immediately prior to the Union Security Agreement. Ex. C at Questions 1 and 2. The separation of the Union Security Agreement from the CBA and the differing expiration dates are unusual and might be unprecedented.

The only consideration offered by the Defendants to support the Union Security Agreement was "labor peace and bargaining unit continuity which both parties acknowledge to be valuable to each of them." Ex. A, introductory paragraph.

The Union sought a union security agreement separate from the CBA because Michigan's new "Freedom To Work" law (also known as "Right To Work"), 2012 PA 349, bans such security agreements and outlaws any legal requirement that an employee pay union dues or fees as a condition of employment. The new Freedom To Work law

did not take effect until March 28, 2013, and it could not void contracts already in existence without a potential breach of the 'contracts clauses' of both the Michigan and United States constitutions. As a result, a contract, such as the Union Security Agreement in the instant case, entered into or extended before the effective date of the new law would be valid if the contract or extension were legal.

In this case, however, the Union Security Agreement violated basic provisions of Michigan's labor law and contract law. It is therefore invalid and unenforceable.

The CBA and the Union Security Agreement were ratified as two separate contracts. The two contracts had separate ratification votes. Ex. C. They covered different matters and differed in the length of their effectiveness. See Ex. B, page 3, Section H, and Ex. A, page 3, Section 1. The CBA covered work details and compensation too numerous to list here, while the Security Agreement covers only one aspect of the labor-management relationship: the payments an employee in the bargaining unit must make to the union in order to maintain employment. Ex. A. The duration of the CBA was four years, expiring in 2017, while the Union Security Agreement expires in 2023 — a length of ten years.

FOUNDATIONAL LEGAL STANDARDS

Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) is properly granted to the moving party when the affidavits and documentary evidence, viewed in the light most favorable to the non-moving party, show that there is no genuine dispute over any

material fact and that the moving party is entitled to judgment as a matter of law. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63 (1996).

Plaintiffs' Third-Party Standing

The Plaintiffs, as intended beneficiaries of a contract, have standing to challenge the contract made on their behalf: "[A] party having the status of a third-party beneficiary to a contract has the same right to enforce that contract as the promisee." *Stillman v Goldfarb*, 172 Mich App 231, 238 (1988). This right is given by statute:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> > (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

MCL 600.1405. The statute goes on to describe the right of a member of a group, such as a bargaining unit, who is unascertainable at the time the contract was made, to enforce the contract:

> If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

MCL 600.1405(2)(b). MCL 600.1405 has been applied to intended beneficiaries of collective bargaining agreements. See, *Menosky v City of Flint*, 2012 WL 5818330 (ED Mich Oct 18, 2012) (attached as Ex. D) wherein the court considered whether the

plaintiffs, who were married to employees who were covered by the subject CBAs, had third party standing to enforce the receipt of benefits under the CBAs. The court held that the *Menosky* plaintiffs did have third party standing to enforce the CBA under MCL 600.1405: ". . . Plaintiffs' claim of breach of contract under a third-party beneficiary theory is sufficiently pleaded. . . ." *Id.* at *2.

Declaratory Relief

Michigan's Rules of Court provide that the circuit courts may issue a declaration to determine the rights and duties of parties. MCR 2.605(A)(1).

DISPOSITIVE LEGAL STANDARDS AND DISCUSSION

Lack of Consideration

It is fundamental that a valid contract requires that consideration be given. "An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740 (2000). It is likewise black-letter law that a pre-existing obligation cannot serve as the consideration for a new contract, and that a new contract or a revision of the existing contract requires new consideration:

> Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise. This rule bars the modification of an existing contractual relationship when the purported consideration for the modification consists of the performance or promise to perform that which one party was already required to do under the terms of the existing agreement.

Yerkovitch, 740-41 (citations omitted). Although the mandatory nature of collective bargaining precludes many of the common-law rules of contract formation, the

consideration requirement is not forgone, and it is applied to labor contracts by the National Labor Relations Board:[1]

> . . . in defining the rights and obligations of the parties with respect to the formation of a collective-bargaining agreement, the [NLRB] has traditionally adopted many of the general, if not highly technical, elements of the common law of contracts. . . . And the Board may even look to some of the more technical aspects to bolster its analysis of a dispute. Relevant to the instant case is the principle, key to the formation of an enforceable contract, that a party must have made commitments in the context of a bargained-for exchange of consideration.

Sacramento Union, 296 NLRB 477, 482 n. 12 (1989) (internal citations omitted).

In the matter before this court, the only "consideration" given for the Union Security Agreement was "labor peace and bargaining unit continuity which both parties acknowledge to be valuable to each of them." This claim of consideration is inadequate.

Consider "labor peace." Given the prior ratification of the CBA, "labor peace" cannot serve as consideration for the Union Security Agreement. After all, the reaching of "labor peace" or "industrial peace" is the reason that mandatory collective bargaining is authorized by Public Employment Relations Act in the first place. MCL 423.201, *et*

[1] Michigan's law regarding public-sector unions, such as the Union here, is governed by the Public Employment Relations Act (PERA), MCL 423.201, *et seq*. Michigan's courts will often look to the federal National Labor Relations Act (NLRA) and the interpretation of the NLRA by the federal courts and the National Labor Relations Board (NLRB) whenever, as here, PERA and the NLRA are analogous or not otherwise in conflict. See, for example, *AFSCME v Highland Park School Dist*, 457 Mich 74, 96 n. 2 (1998) (citations omitted): ". . .the instant case is governed by the public employee relations act. It is true that the PERA is patterned after the federal National Labor Relations Act. Moreover, in 'construing our state labor statutes we look for guidance to "the construction placed on the analogous provides of the NLRA by the [National Labor Relations Board] and the Federal Courts.'"

seq. The Michigan Employment Relations Commission ("MERC") has stated: "[T]he primary objective of PERA is the prompt effectuation of labor peace, achieved through the existence of a mutually accepted collective bargaining agreement." *Waterford School Dist and Waterford Educ Ass'n*, 23 MPER ¶ 91 (Oct 22, 2010). The courts have likewise determined that labor peace is the reason for collective bargaining. "A prime purpose of the Act is to foster industrial peace through collective bargaining." *Modern Plastics Corp v NLRB*, 379 F2d 201, 204 (CA6 1967). Hence, every collective bargaining agreement authorized by the NLRA must provide labor peace:

> We need not decide whether or not this strike settlement agreement is a "collective bargaining agreement" to hold, as we do, that it is a "contract" for purposes of § 301(a). "Contract in labor law is a term the implications of which must be determined from the connection in which it appears." [*J I Case Co v NLRB*, 321 US 332, 334 (1944)]. It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them.

Retail Clerks Inter Ass'n Local Unions Nos 128 and 633 v Lion Dry Goods, 369 US 17, 28 (1962). The provision of labor peace is therefore part of every collective bargaining agreement, whether or not the provision of labor peace is explicitly listed as consideration. Thus, labor peace was already given as consideration for the CBA, and the effectuation of labor peace was a pre-existing duty that could not be used as consideration for the subsequent Union Security Agreement.

Nor could either Defendant offer "bargaining unit continuity" as consideration. Michigan statutes grant a public-sector union only three years of guaranteed representation — the three-year "contract bar" that is discussed at length in a section

below. The School Board, meanwhile, is a legislative body which cannot bind subsequent boards – which is also discussed at length in a subsequent section. Therefore neither Defendant could give the bargaining continuity as promised.

Consideration that a promisor cannot provide is not valid. In *Barbat v M E Arden Co*, 74 Mich App 540 (1977), an agent sought to make his representation of a client consideration for their contract. Because he was unable to represent the client as promised, however, the court concluded that, "to the extent that it promised a performance to the purchaser, that promise was void as illegal. An unenforceable promise cannot constitute consideration." *Id*. at 543-44. A contract given without consideration is excused from performance and cannot bind the parties. It is therefore void as a matter of law:

> . . . Michigan recognizes the rule that failure of consideration by one contracting party justifies the other party to the contract in refusing to perform his obligations. . . . *Jinkner v Town & Country Lanes, Inc*, 10 Mich App 596 (1968), applied the rule to an ordinary commercial contract. *Nogaj v Nogaj*, 352 Mich 223, 228 (1958), dealt with a condition subsequent in a deed between a husband and wife. *Perkins v Brown*, 115 Mich 41 (1897), *Folkerts v Marysville Land Co*, 236 Mich 294 (1926), and *Palmer v Fox*, 274 Mich 252 (1936), fall into the same category. They demonstrate that Michigan follows the general rule that failure of consideration provides a legal excuse for non-performance of a contract.

Staszak v Romanik, 690 F2d 578, 584 (CA6 1982). A pre-existing duty cannot serve as consideration because it has already been given, and consideration has to be something new that is within the promisor's power to give. Both of these elements are missing from the Union Security Agreement.

Labor Law Requires One Unified Collective Bargaining Agreement

It is probably true that no Michigan court has invalidated a ten-year union security agreement like the instant one because it was entered into separately from the collective bargaining agreement. This does not help the Defendants' arguments, because no such security agreement seems to have been attempted. And in fact, both statutory law and labor 'common law' provide reasons that such multiple agreements are inappropriate. Indeed, the public policy reasons behind collective bargaining agreements all point to a requirement that an employer and union negotiate a single unified collective bargaining agreement of moderate length.

Under PERA, a public-sector union is guaranteed the ability to serve as the exclusive representative of a bargaining unit for only three years after entering into a collective bargaining agreement:

> (1) . . . A collective bargaining agreement does not bar an election upon the petition of persons not parties to the collective bargaining agreement if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

MCL 423.214. This is the three-year "contract bar" discussed earlier. Michigan's statutory bar appears to have been enacted to parallel a decision of the NLRB. The NLRB administratively set the bar at three years:

> Today, a decade and a half following the establishment of the Board's basic 2-year contract-bar rule, we enlarge the 2-year period to 3, making no other changes. Contracts of definite duration for terms up to 3 years will bar an election for their entire period; contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years. All other contract-bar

> rules, whether related or unrelated to the subject of contract term, remain unaltered; our new 3-year rule is to be read in harmony with them.

General Cable and United Electrical, 139 NLRB 1123, 1125 (1962). Therefore, any guarantee of representative stability is barred for any period longer than three years. *General Cable* went on to discuss the public policy reasoning behind the three-year contract bar. Notably, this includes the need of employees to retain the right to eradicate discontent within their own union and choose another representative:

> Compositely, all these factors serve to stress the efficacy of collective agreements, the need to respect their provisions, the desirability of discouraging raids among unions, **the wisdom of granting relief to employees to assist them in eradicating major causes of discontent arising within their own institutions and from [the institution's] relations with [the institution's] employees,** and the imperative for long-range planning responsive to the public interest and free from any unnecessary threat of disruption.
>
> The accommodation we have made in balancing **the interest of employee freedom to choose representatives**, and the interest of stability of industrial relations, is in the perspective of these conditions and events.

Id. at 1126 (emphasis added).

Furthermore, the three-year contract bar implicates other aspects of the Union Security Agreement and the CBA. Notably, the NLRB and the courts have implied that the purpose and public policy behind the contract bar are served when the collective bargaining agreement is the same length as the contract-bar rule:

> Under the NLRB's contract bar rule, "if an employer and a union have entered into a [CBA], the agreement constitutes a bar to the holding of a representation election for the life of the agreement, up to a maximum of three years." *NLRB v. Arthur Sarnow Candy Co*, 40 F3d 552, 557 (CA2 1994); see *Osteopathic Hosp Founders Ass'n v NLRB*, 618 F2d 633, 638

> (CA10 1980) (acknowledging the existence of the contract bar rule). Thus, the contract bar rule "prohibits employers from petitioning the Board for decertification of a union and from repudiating the contract or withdrawing recognition from and refusing to bargain with a union **during the term of the [CBA].**" *NLRB v Rock Bottom Stores, Inc*, 51 F3d 366, 370 (CA2 1995).

NLRB v F&A Food Sales, Inc, 202 F3d 1258, 1260 (CA10 2000) (emphasis added). The contract bar was meant to protect the union "during the term of the [CBA]." The contract bar was meant to be the same length as the collective bargaining agreement, and the NLRB has stated that three years is a "reasonable" length of time: "The purpose of the [three-year] contract-bar rule is 'to promote industrial peace by stabilizing, for a reasonable term, a contractual relationship between employer and union.'" *Id.* at 1261. Binding the employees to a particular union through a collective bargaining agreement or union security agreement of more than three years runs afoul of the public-policy goal of "granting relief to employees to assist them in eradicating major causes of discontent arising within their own institutions and from [the institution's] relations with [the institution's] employees. . . ." *General Cable*, 139 NLRB at 1126. While it is probably true that under PERA there have been collective bargaining agreements that have exceeded three years, there has probably never been a collective bargaining agreement (such as the Union Security Agreement) so far in excess of the three-year contract bar that it should be struck down. Note, too, that this excessive length of contract is also a reason, as noted earlier, there is a lack of consideration: The Union cannot guarantee its

representation for more than three years and cannot provide "bargaining unit stability" beyond those three years.

Additionally, the presence of multiple agreements in the instant case is problematic. First, Michigan recently enacted a statute to prohibit certain side agreements from continuing in force after the expiration of a collective bargaining agreement. This law took effect on June 8, 2011. Not surprisingly, there are no appellate cases interpreting this statute yet. The statute itself states:

> (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits.

MCL 423.215b. The statute then continues to explain the strict prohibition on any extension of the provisions of the collective bargaining agreement without regard to "any agreement of the parties" to extend the terms of the collective bargaining agreement:

> Sec. 15b. (4)(a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

In the pleadings, Defendants rely on a 1990 MERC opinion, *Ann Arbor Fire Fighters Local 1733*, 3 MPER ¶ 21106 (July 23, 1990), for the proposition that a ten-year

side agreement is allowable. However, *Ann Arbor Fire Fighters* is not on point here; it has largely been overruled by MCL 423.215b, and is, in any event, not binding on this court.

In *Ann Arbor Fire Fighters*, the city of Ann Arbor and the local fire fighters union entered into a collective bargaining agreement. As part of this agreement, they included an automatic step-up in base wages based on longevity of employment. The two sides also entered into a ten-year side agreement that was known as the "pension moratorium." This moratorium prevented either side from making changes that might reduce future retirees' pension payments. *Id.*

After the collective bargaining agreement expired, the city tried to bargain for a different way to compensate for longevity. *Id*. The union in turn refused to bargain on this matter because, it claimed, any change in the wage would affect the pension and thereby violate the ten-year side agreement. *Id*.

In 1990, MERC held the union's refusal to bargain over longevity compensation did not constitute an unfair labor practice: "[W]e find that the Union did not violate its duty to bargain in good faith by its conduct in this case." *Id*. As to whether or not such a ten-year side agreement was permissible under the laws that were argued (and which predated MCL 423.215b), MERC determined that this "should be addressed on a subject-by-subject basis." *Id*.

To the extent that the ten-year "pension moratorium" in *Ann Arbor Fire Fighters* kept in place the automatically increasing longevity-based wages or other wage issues

after the expiration of the collective bargaining agreement, MERC's ruling in this case was clearly overridden by the passage of MCL 423.215b. If the union wanted these increases to continue, it would have to bargain for them in a new collective bargaining agreement. And arguendo, even if *Ann Arbor Fire Fighters* were not overruled by MCL 423.215b, agency determinations such as MERC's in *Ann Arbor Fire Fighters* are not binding on the courts (though they are entitled to "respectful consideration"). *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (2008). Defendants' appeal to *Ann Arbor Fire Fighters* — Defendants' sole authority — in defense of the ten-year side agreement in the instant case is not compelling.

There is a second problem with multiple agreements. The previously discussed three-year contract bar of MCL 423.214 is a statutory requirement that there be one unified collective bargaining agreement with one expiration; having more than one collective bargaining agreement would make the statute a toothless nullity. As we have seen, the three-year contract bar protects union representation for three years from the "agreement's execution or last timely renewal." MCL 423.214. If there were more than one agreement, however, which agreement would serve as the starting point for the three-year period after which a new union could come in and represent the employees? After all, each such agreement would be collectively bargained, and each would arguably serve as a "collective bargaining agreement" under MCL 423.214. By using two such collective bargaining agreements and alternating their renewal, the union could ensure that the three-year contract-bar period never expired.

In fact, there would be no need to stop at just two agreements. Multiple agreements could be made with staggered expiration dates. This would make MCL 423.214 meaningless and deny the policy goals it was meant to achieve. "The Court must avoid construing a statute in a manner that renders statutory language nugatory or surplusage." *People v Ball*, 297 Mich App 121, 123 (2012).

Furthermore, "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Robinson v Lansing*, 486 Mich 1, 8 n. 4 (2010). Reading MCL 423.214 and MCL 423.215b *in pari materia* is especially appropriate where, as here, the two statutes are so close in sequence within the same act. In this case, the system is clear: There is to be one controlling collective bargaining agreement that governs the terms and conditions of employment.

Binding Subsequent Legislators

The School Board, by entering into the Union Security Agreement, has attempted to bind subsequent school boards to a certain policy of hiring and firing for the next decade. Such an exercise of legislative constraint is not permissible, however.

Begin with the fact that in general, a state legislature cannot bind a future state legislature to a policy that the subsequent body cannot change at its discretion:

> Of primary importance to the viability of our republican system of government is the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation. Therefore, a fundamental principle of the jurisprudence of both

> the United States and this state is that one legislature cannot bind the power of a successive legislature.

Studier v Mich Pub Sch Employees' Retirement Bd, 472 Mich 642, 655–56 (2005).

The School Board derives its authority from the state legislature and is a "general powers school District." A copy of this relevant bylaw is attached as Ex. E, "Board Bylaws Effective August 24, 2009, 1010 District Legal Status." As a "general powers school district it is endowed with certain powers by the state legislature." See, generally, the Revised School Code, MCL 380.1 *et seq*. Further, the School Board itself is a legislative body. The School Board acknowledges this legislative function in its Bylaws: "The Board will function as a legislative body in formulating and adopting policy, by selecting an executive officer to implement policy and by evaluating the results." Ex. F, "Board Bylaws Effective August 24, 2009, 1001 Introduction and Information."

The legislature cannot grant to the School Board (or any other legislative body or executive agency) powers beyond the legislature's own. If the legislature cannot bind subsequent legislatures, a school board cannot bind subsequent school boards.

Of course, legislative bodies such as the school board do have the power to enter into contracts that may bind subsequent legislative bodies to a certain action. To protect against the abuse of using a contract to set an unalterable policy, however, the courts have set a high standard for ensuring that it is truly a valid contract and not just an end-run around the fundamental prohibition on making unalterable policy. Notably, Justice Cooley set forth the standard, writing for a unanimous court:

> Legislators cannot thus bind the hands of their successors where the elements of contract, concession and **consideration** do not appear; and the doctrine that it may do so by contract is one so exceptional, and so liable to abuses, that courts will not be astute in discovering the existence of a contract between the state and those who claim franchises under it, where the essential elements of a contract are not manifest.

City of Detroit v Detroit & Howell Plank-Road Co, 43 Mich 140, 145 (1880) (emphasis added). [2] As we have seen in the discussion of consideration, consideration is wholly lacking here. The "labor peace" consideration was a pre-existing duty that was already given for the CBA. And just as the Union could not provide its promised "bargaining unit continuity," neither could the School Board give bargaining continuity without impermissibly binding its successors. School boards are supposed to be able to break continuity and change policy directions as they are elected or re-elected.

The ten-year Union Security Agreement entered into by the School Board sets public policy. It suspends the state's Freedom to Work Act in the Taylor School district for over a decade. It forces subsequent school boards to fire teachers at the request of the

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[2] Defendants may object that the holding in *Detroit & Howell Plank-Road* is obsolete based on its age. This objection is not telling. *Detroit & Howell Plank-Road* has not been overruled by our Supreme Court; it remains controlling law. See, *State Treasurer v Sprague*, 284 Mich App 235, 242 (2009) (internal citations omitted):

> . . .this Court remains bound by our Supreme Court's decision . . . until such time as our Supreme Court instructs otherwise: "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." . . . "The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete."

union, even if future school boards see this as a bad policy. It forces subsequent school boards to demand payment of union dues or fees, currently set at approximately $800 a year, from the teachers in the district, even if this depresses teacher recruiting and retention in an environment in which teachers in many competing school districts will not face a similar punitive demand. Where, as here, the "essential elements of contract are not manifest," and the Union Security Agreement is solely for the purpose of setting policy, the School Board "cannot thus bind the hands of their successors." *Detroit & Howell Plank-Road Co.*, 43 Mich at 145.

Conclusions

The Defendants must fail in their attempt to use an unenforceable contract to lock a public policy into place. Contracts require consideration, and the Union Security Agreement provides only "labor peace" that both parties already have as a prior duty. "Bargaining unit continuity" is not a viable consideration, since the Union cannot in fact provide it, at least beyond the three-year bar, and the School Board cannot provide it without impermissibly binding subsequent boards.

Indeed, the purported public policy goal of mandatory collective bargaining is to achieve labor peace through "a mutually accepted collective bargaining agreement," *Waterford Schools, supra* — i.e., a collective bargaining agreement that is comprehensive, not one that is simply a side agreement covering only one aspect of employment. That this is the policy of Michigan is obvious through its statutes, one of which bans certain side agreements whose terms extend beyond that of the collective

bargaining agreement, and another of which protects the union's right to uninterrupted representation for only three years from the execution of the collective bargaining agreement. Allowing multiple agreements would thwart the state's public policy by rendering the three-year contract bar meaningless and unenforceable. A court cannot interpret a statute in a way that renders it nugatory.

Lastly, a public body cannot create a public policy that prevents future public bodies from exercising policy discretion. The instant Union Security Agreement is all about setting public policy and avoiding the enactment of Freedom to Work. When a public body tries to bind subsequent bodies through the use of contract, the courts will treat such attempts as "exceptional" and carefully scrutinize the contract to ensure that the element of consideration is present. *Detroit & Howell Plank-Road*, *supra*. As we have seen in this instance, the only consideration provided was a pre-existing duty ("labor peace") and a promise that could not be kept ("bargaining unit continuity").

For these reasons the Plaintiffs request the honorable Court grant them summary disposition and award them the relief requested in the motion.

Respectfully submitted,

Dated: May 10, 2013

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