UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
Harrisburg Division

JOHN R. KABLER, JR., Plaintiff, v. UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776 KEYSTONE STATE, *et al.*, Defendants.	**Case No. 1:19-CV-0395** (Hon. Sylvia H. Rambo) --ELECTRONICALLY FILED--

PLAINTIFF'S REPLY BRIEF TO UNION DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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All record evidence supports Mr. Kabler's claim that, until after this lawsuit was filed, he was forced to remain a union member and provide financial support to and association with Local 1776. In their latest posturing, Union Defendants now theorize that Mr. Kabler's union membership resignation was somehow immediately honored. However, Union Defendants have offered no record evidence—as required to dispute material facts—in support of its new theory, relying solely on assertions found only in their briefs in opposition to summary judgment.

Moreover, Union Defendants' challenges based on state action ignore the undisputed record evidence regarding the joint actions taken by Union Defendants and the Commonwealth itself and misapply the Third Circuit's state action case law. As set forth in more detail below, public-sector labor unions have long been considered state actors in relation to union dues and fee deductions, and there is no doubt that, in this instance, Union Defendants are quintessential state actors and state action is present.

Because Union Defendants have failed to raise a genuine issue regarding any material fact and because their legal arguments do not undermine Mr. Kabler's entitlement to judgment as a matter of law, Mr. Kabler's motion for partial summary judgment on Count Two of his complaint should be granted.

I. MR. KABLER IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO BECAUSE THE ONLY EVIDENCE OF RECORD SUPPORTS HIS CLAIM

All evidence in the record supports Mr. Kabler's claim that he was forced to remain a union member, despite his resignation letter, until after this lawsuit was filed. Union Defendants' new theory that Mr. Kabler became a nonmember when he sent his resignation letter requires this Court to ignore the undisputed evidence in the record regarding membership resignation: that the governing collective bargaining agreement ("CBA") and state law limited Mr. Kabler's ability to resign his union membership to a 15-day window prior to the expiration of the CBA, 43 P.S. § 1101.301; Defs.' Joint Statement of Material Facts Not In Dispute ¶¶ 17–20, ECF No. 36 ("Defs.' Joint Statement"), a provision the Commonwealth enforced, Declaration of Plaintiff John R. Kabler, Jr., in Support of Plaintiff's Cross Motion for Partial Summary Judgment ¶¶ 7–8, ECF No. 39-2 ("First Kabler Decl."); Compl. Ex. D, ECF No. 1-1, and that Mr. Kabler *paid union dues* as if he were considered a member, First Kabler Decl. ¶¶ 11–12, consistent with the CBA and state law. The one piece of evidence Union Defendants claim supports their theory—the purported membership agreement—says nothing about membership resignation and, in fact, as set forth in more detail below, *see infra* Section I.C, actually supports Mr. Kabler's claim that he was compelled to be a union member for months after he tried to resign in July 2018.

"Although the non-moving party receives the benefit of all factual inferences in the court's consideration of a motion for summary judgment, the nonmoving party must point to some evidence in the record that creates a genuine issue of material fact." *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). "In this respect, summary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." *Id.*

In other words, "a party opposing summary judgment must offer more than his own assertions to support his claim." *Davila-Bajana v. Holohan*, 309 F. App'x 606, 610 (3d Cir. 2009). A mere assumption about the facts will not suffice to defeat summary judgment, particularly where it forces the other party "to prove a negative at the summary judgment stage." *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 332–33 & n.9 (3d Cir. 2005); *see also Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 227–28 (3d Cir. 2009) (citing *Lexington Ins. Co.* for the proposition that "speculation and conjecture may not defeat a motion for summary judgment"). Neither will "merely colorable, conclusory, or speculative evidence." *Longo v. SCI Camp Hill*, No. 3:17-CV-2104, 2019 WL 1607725, at *2 (M.D. Pa. Feb. 25, 2019) (attached hereto) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

A. All Record Evidence Supports Mr. Kabler's Claim that He Was Compelled to Be A Union Member and Pay Union Dues Even After His July 2018 Resignation

Here, all the evidence in the record, both as to the provisions governing Mr. Kabler's ability to resign and as to the facts surrounding his resignation, supports Mr. Kabler's claim: he was unconstitutionally forced to remain a member of Local 1776 pursuant to the terms of the CBA. It was not until Local 1776 finally made an exception to the CBA's maintenance of membership provision that Mr. Kabler was let out of the union, which was after this lawsuit was filed and approximately nine months after he sent his union membership resignation.

State law authorizes employee organizations and public employers to enter into collective bargaining agreements that provide for "maintenance of membership," which forces union members to maintain their union memberships and limits members' ability to resign membership to a 15-day window period immediately preceding the expiration of a collective bargaining agreement. 43 P.S. § 1101.301. Article 4 of the CBA between the Commonwealth and Local 1776, through the UFCW Council, contained such a provision: "Each employee who is or becomes a member of the Union shall maintain such membership for the duration of this Agreement provided that such employee may resign from the employee organization within the 15 days prior to the expiration of this Agreement . . . ." Compl. Ex. A at 5, ECF No. 1-1; Pl.'s Statement of Material Facts ¶ 12, ECF No. 41; Defs.' Joint Statement ¶¶ 17–20.

Mr. Kabler sent a letter to Local 1776 with a copy to the Commonwealth in July 2018, resigning his Local 1776 union membership and requesting "written confirmation of the acceptance or denial of [his] request." Second Gold Decl. Ex. C, ECF No. 35-1. The only written response to his resignation was from the Commonwealth, which stated that "the UFCW contract only allows for employees to withdrawal [sic] membership during the 15 day period prior to the expiration of the agreement . . . . Therefore, we are unable to process your request unless we are informed that UFCW is making an exception to this language." First Kabler Decl. ¶¶ 7–8; Compl. Ex. D; Defs.' Joint Counter-Statement of Material Facts ¶ 17, ECF No. 53 ("Defs.' Joint Counter-Statement"). Local 1776 official Andrew Gold left Mr. Kabler two voicemail messages—one on July 19, 2018 and another on August 2, 2018—stating only that he wished to speak with Mr. Kabler about what he called his "request to resign" and "opt out" and wanted to "give [him] some information." First Kabler Decl. ¶¶ 7–9; Second Decl. of John R. Kabler, Jr., ¶¶ 13-15, ECF No. 50-3.[1] Membership dues deductions continued from Mr. Kabler's wages. First Kabler Decl. ¶¶ 11–12.

By letter to Mr. Kabler dated April 2, 2019, nearly a month after this lawsuit was filed, Defendant Young wrote that Mr. Kabler was "no longer a member of

[1] Although immaterial to Mr. Kabler's motion, Mr. Gold did *not* have a phone conversation with Mr. Kabler on August 10, 2018. Second Decl. of John R. Kabler, Jr. ¶¶ 16–17, which is demonstrated by the only documentary evidence regarding the phone calls. *See* Second Kabler Decl. Ex. A.

UFCW Local 1776 KS, and that [Mr. Kabler's] dues deductions will cease effective April 10, 2019." Second Gold. Decl. Ex. D. Union Defendants' correspondence with the Commonwealth dated April 10, 2019, states that Mr. Kabler "is no longer a member of UFCW Local 1776KS," and that "[e]ffective today, April 10, 2019, union dues should no longer be deducted." Second Gold Decl. Ex. E.

The withholding of membership dues from Mr. Kabler's wages stopped with his paycheck on May 3, 2019, and so, too, did the phone calls that Mr. Kabler had regularly received on his personal cell phone from Local 1776 both before and after his resignation letter, which had addressed Mr. Kabler as a "union member" and had informed Mr. Kabler of changes to scheduled union membership meetings. *See* Third Decl. of John R. Kabler ¶¶ 2–6, filed herewith.

Thus, all of the evidence in the record regarding union membership resignation supports Mr. Kabler's claim and the reality that he was forced to remain a union member until after this lawsuit was filed. State law so authorized, the governing CBA entered into between the union and Commonwealth so provided, and the Commonwealth so stated. All the accompaniments of union membership that Mr. Kabler had had before his resignation, such as membership dues withheld from his wages and membership communications from Local 1776, persisted well beyond July 2018 and to April 2019, after this lawsuit was filed.

B. Union Defendants Have Provided No Record Evidence That They Honored Mr. Kabler's July 2018 Union Resignation

Union Defendants acknowledge that they have no record evidence supporting their assertion that Mr. Kabler's resignation was honored or effective when it was tendered.[2] In fact, they admit that "the record evidence demonstrates that Plaintiff did not receive a letter confirming his membership ended until the Local's April 2, 2019 letter." Union Defs.' Br. in Opp. to Pl.'s Mot. for Partial Summ J. 12, ECF No. 55 ("Union Defs.' Br."). None of the correspondence processing or honoring Mr. Kabler's resignation occurred until April 2019, after this lawsuit was filed, nor does any of that correspondence identify any dates certain as to the end of Mr. Kabler's

[2] If Defendants are permitted to proceed with their new theory that Mr. Kabler became a nonmember of Local 1776 when he sent his resignation letter, then Mr. Kabler should be permitted to amend his complaint to seek relief on the First Amendment violation they have conceded—that money was withheld from Mr. Kabler as a nonmember without proper waiver and consent. "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) *see also Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988) (waiver of constitutional rights must be "voluntary, knowing, and intelligent"). Although Defendants provide purported waiver language in the membership agreement alleged to have been signed by Mr. Kabler, this language informs the reader that employees "are required to pay" fees to the union, Defs.' Joint Counter-Statement ¶ 24, which is in direct contradiction to the Supreme Court's ruling in *Janus*. Apart from the many other issues regarding the membership agreement's terms and circumstances surrounding Mr. Kabler's signing of a membership agreement, which are immaterial to Mr. Kabler's motion for partial summary judgment, such waiver language could not be a knowing and voluntary waiver of Mr. Kabler's First Amendment rights as it existed in and was only compliant, if at all, for a pre-*Janus* world.

membership, other than the dates in April 2019. *Cf. Qazizadeh v. Pinnacle Health Sys.*, 214 F. Supp. 3d 292, 300–03 (M.D. Pa. 2016) (granting summary judgment where party opposing did not carry their burden and "avoid[ed] any sort of outright claim regarding the details").

Instead of providing more than a mere assertion that they accepted Mr. Kabler's resignation in July 2018, Union Defendants attempt to shift their burden to Mr. Kabler, suggesting that Mr. Kabler must somehow demonstrate that Union Defendants did not secretly accept his resignation when it was tendered. But "[c]ourts are particularly wary of forcing the party to prove a negative at the summary judgment stage," so "[i]f a document existed which could establish that" Union Defendants had accepted Mr. Kabler's resignation, they "should have produced it, or explained through affidavits or other evidence why they could not do so." *See Lexington Ins. Co.*, 423 F.3d at 332 n.9.

Lacking any record evidence to support their newly articulated resignation theory, Union Defendants do not point to any specific details or record evidence. Instead, they have only their own assertions made in a brief—asking this Court to revise history and assume that Mr. Kabler's resignation was accepted immediately—without any record evidence that it was. Union Defendants' position ignores the resignation-related record evidence, the relevant CBA and Mr. Kabler's union dues

payments, and makes an assertion Union Defendants acknowledge has no support in the record.[3]

Union Defendants suggest that Mr. Kabler should have assumed he was no longer a member, but this argument is also unsupported by record evidence. Because of the governing CBA, the default for Mr. Kabler was that he was required to remain a union member until the 15-day window period immediately preceding the expiration of the agreement. And Defendants did nothing, until after this lawsuit was filed, to change that default status. Even setting aside all of the evidence Mr. Kabler has provided in this matter supporting his position that he was forced to remain a union member and pay union dues after his resignation, at the very least, without evidence showing Mr. Kabler's resignation was immediately honored, the only conclusion that this Court can draw from the record evidence is that Mr. Kabler was forced to remain a union member and pay union dues well beyond his resignation and until April 2019.

Effectively, what Union Defendants ask this Court to do in their brief opposing summary judgment is to ignore all relevant record evidence governing union membership resignation and believe, via assertions without any supporting record

[3] Defendants also offer this argument by way of analogy to private labor law on a point where the two regimes differ dramatically. *See* Union Defs.' Br. 13 & n.5. Unlike in private labor law, where private employee union members have the right to resign from union membership at any time, *see Pattern Makers' League of N. Am., AFL-CIO v. N.L.R.B.*, 473 U.S. 95, 106 (1985), in Pennsylvania, public employee union members may be required to maintain their union membership until the expiration of a collective bargaining agreement, if the agreement so requires. 43 P.S. § 1101.301. The CBA governing Mr. Kabler's employment did so require.

evidence, that Mr. Kabler's resignation was immediately effective. This, however, ignores *all* relevant facts in the record regarding resignation, instead relying "solely on assertions made in . . . legal memoranda," and therefore must fail. *See Berckeley Inv. Grp., Ltd.*, 455 F.3d at 201.

C. The One Piece of Evidence Upon Which Defendants Rely Actually Proves Mr. Kabler Remained a Dues-Paying Member

Union Defendants suggest that the membership agreement purportedly signed by Mr. Kabler somehow supports their argument, yet Union Defendants do not suggest that the membership agreement had any provision governing resignation. Moreover, Union Defendants cannot explain how they could end his membership yet still force him to pay *membership dues*; the agreement's own terms make clear that any money withheld under that membership agreement would have been "regular union membership dues" and dues "payable . . . as a member." Second Gold Decl. Ex. A; Defs.' Joint Counter-Statement ¶ 25. The membership agreement Union Defendants point to contains no authorization for the withholding of money from an employee's wages outside of union membership dues—which, by definition, would be paid only by union members. As such, since Mr. Kabler continued to have union dues taken from his wages after his July 2018 resignation, Union Defendants clearly considered Mr. Kabler a union member in spite of his resignation: Union membership is the only basis upon which union dues were authorized under the membership agreement Union Defendants have provided.

Union Defendants have changed the text of Local 1776's membership agreement in recent years to reflect what one can only assume they *wish* Mr. Kabler's membership agreement stated. Union Defendants' current membership agreement, but not the one Mr. Kabler purportedly signed, attempts to require members to authorize deductions not of "regular union membership dues," but of "the sum equivalent to regular union membership dues" "regardless of whether I am or remain a member of the Union." *See* Decl. of David R. Osborne, Esq. Ex. A, ECF No. 50-4.

But again, the language of the membership agreement purportedly signed by Mr. Kabler only authorizes union dues to be deducted from a union member. As such, the only explanation for the continued union dues deductions from Mr. Kabler's wages from July 2018 to April 2019 is that Union Defendants considered Mr. Kabler a union member through April 2019.

Finally, but not insignificantly, Union Defendants admit the withholding of money from Mr. Kabler's wages was pursuant to the CBA provision, which provides that "[t]he Employer agrees to deduct dues and initiation fees." Defs.' Joint Statement ¶ 18; Compl. Ex. A at 5; *see also* 43 P.S. § 1101.705 (authorizing provisions in collective bargaining agreements relating to "membership dues deduction"). If the monies the Commonwealth garnished from Mr. Kabler's wages were not Local 1776 membership dues, Defendants have no explanation for why or under what authority the Commonwealth withheld the money.

II. MR. KABLER HAS DEMONSTRATED THAT STATE ACTION IS PRESENT IN THIS ACTION UNDER THIRD CIRCUIT CASE LAW

Contrary to Union Defendants' contentions, Mr. Kabler has established through undisputed record facts that state action exists in this lawsuit as to both Union and Commonwealth Defendants.

A. Union Defendants' Actions Under Color of Law Are Undisputed

The record evidence demonstrates, on undisputed facts, that Union Defendants are state actors for purposes of Mr. Kabler's claim, under Third Circuit case law governing state action. This would be true even accepting Union Defendants' new theory, that the Commonwealth was helping Local 1776 "enforc[e]" a "private contract." Union Defs.' Br. 10.

Decisions in this district have specifically noted the "clearly established pattern, if not precedent, in favor of hearing § 1983 claims against public-sector unions." *Williams v. Pennsylvania State Educ. Ass'n*, No. 1:16-cv-02529-JEJ, 2017 WL 1476192, at *4 (M.D. Pa. Apr. 25, 2017) (citation omitted) (attached hereto); *accord Misja v. Pennsylvania State Educ. Ass'n*, No. 1:15-cv-1199, slip op. at 15 (M.D. Pa. Mar. 28, 2016), ECF No. 28 (same) (attached hereto); *see also Otto v. Pennsylvania State Educ. Ass'n*, 107 F. Supp. 2d 615 (M.D. Pa. 2000) (adjudicating Section 1983 claim against public employee union), *aff'd in relevant part*, 330 F.3d 125 (3d Cir. 2003). In *Williams*, this Court concluded that a public-sector union was a state actor for purposes of civil

rights claims, particularly because the union relied on a collective bargaining agreement with the government. It reasoned

> that the authority to enforce the [challenged] provision in the collective bargaining agreement is an agreement between the union and the state. The union, therefore, relies on the state to enforce the agreement and execute it, bringing the action within the realm of state action governed by § 1983.

Williams, 2017 WL 1476192, at *4 (citations omitted).

To determine whether a private party has acted under color of state law is a "fact-specific" inquiry, and the Third Circuit has

> outlined three broad tests generated by Supreme Court jurisprudence to determine whether state action exists: (1) "whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state"; (2) "whether the private party has acted with the help of or in concert with state officials"; and (3) whether "the [s]tate has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity."

Kach v. Hose, 589 F.3d 626, 646 (3d Cir. 2009) (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995)).

One factor, among others, that is relevant to "determining whether a particular action or course of conduct is governmental in character," is "the extent to which the actor relies on governmental assistance and benefits." *Mark*, 51 F.3d at 1143 (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478 (1988)). "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Prof'l Collection Servs., Inc.*, 485 U.S. at 486.

Here, Union Defendants are state actors having "acted with the help of or in concert with state officials" to deny Mr. Kabler's union resignation and collect union dues from his wages, and the facts leading to that conclusion are undisputed by Union and Commonwealth Defendants. For instance, state law makes "membership dues deduction" and "maintenance of membership" "proper subjects of collective bargaining." 43 P.S. § 1101.705. Pursuant to state law, Union Defendants bargained for and received the entitlement to deduction of dues and to maintenance of membership as well as the Commonwealth's promise to enforce these terms. *See* Defs.' Joint Statement ¶¶ 19–20. Following Mr. Kabler's resignation letter, Commonwealth Defendants made clear to Mr. Kabler, in writing, that they would enforce the agreement on behalf of Union Defendants, informing Mr. Kabler that his deductions would not cease "unless" Union Defendants "ma[de] an exception." First Kabler Decl. ¶¶ 7–8; Compl. Ex. D.

Not only do Union and Commonwealth Defendants work jointly and in concert together in the execution of membership dues deduction and enforcement of maintenance of membership, but union dues deductions by Commonwealth Defendants is a significant benefit to Union Defendants, fitting the Third Circuit's second test for state action. *Accord Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (recognizing that unions "face substantial difficulties in collecting funds for political speech without using payroll deductions" (quotation omitted)); *see Janus*, 138 S. Ct. at 2467 (referring to payroll deduction as a "special privilege[ ]"); *Wisconsin Educ.*

Ass'n Council v. Walker, 705 F.3d 640, 645 (7th Cir. 2013) (recognizing that state deduction of union dues for public sector unions means that the government is assisting in funding the expression of ideas).

Similarly, even if, as the Union Defendants now theorize, the Commonwealth withheld Mr. Kabler's wages pursuant to a "private contract" (and that is not what happened here), Union Defendants obtained yet another significant benefit from the Commonwealth: the enforcement of its private contracts via state-compelled wage garnishment.

Union Defendants argue that the only way there can be state action in this case is if Commonwealth Defendants "significantly encouraged" Union Defendants' unconstitutional actions. By that argument, though, Union Defendants naively—or purposefully—ignore the fact that there are three state action tests recognized by the Third Circuit, and only focus on the third.

The second of the Third Circuit's three state action tests, the relevant one here, considers joint action by the state and the private actor, and does not require a finding that the government "significantly encouraged" an otherwise private actor. This makes sense because, in a case involving joint action, the state *itself* has acted. Instead, the "significantly encourage" language is relevant only to the Third Circuit's *third* test for state action, where the challenged actions are those solely of a private party, *see Kach*, 589 F.3d at 648 (under the third test, "[t]he State will be held responsible for a private decision only when it has exercised coercive power or has provided such

significant encouragement, either overt or covert, that the choice must in law be deemed that of the State" (internal quotations and emphasis omitted)), which is not the reality of this present lawsuit.

B. Actions Taken by the Commonwealth Here—the Literal State Action—Are Undisputed

Here, the Commonwealth itself took the actions that violated Mr. Kabler's First Amendment rights: they withheld money from his wages despite his resignation, forcing him to support and be associated with an organization against his will, pursuant to state statute and the CBA with Union Defendants. Thus, there is also state action in this instance because there is literal action by the Commonwealth.

The Supreme Court has often, both recently and historically, ruled on Section 1983 claims, which necessarily require state action, stemming from constitutional violations due to public-sector union wage deductions, as has the Third Circuit. *See, e.g.*, *Janus*, 138 S. Ct. at 2486; *Harris v. Quinn*, 573 U.S. 616, 625–26 (2014); *Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125 (3d Cir. 2003); *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). The Supreme Court in *Janus* also recognized that state action was implicit whenever union payments are deducted from public employees by requiring a waiver of First Amendment rights before such dues can be deducted—a nonsensical requirement were there to be no state action. *See Janus*, 138 S. Ct. at 2486.

The Commonwealth withheld money from Mr. Kabler's wages, as authorized by state statute and the governing CBA. *See* 43 P.S. § 1101.301(11) (defining

"Membership dues deduction[s]" as a "practice of a public employer"). The Commonwealth agreed to and enforced a maintenance of membership provision in the CBA governing Mr. Kabler's employment, as authorized by state law, even rejecting Mr. Kabler's membership resignation after he made clear that such withholding was without his consent. 43 P.S. § 1101.301; Defs.' Joint Statement ¶¶ 17–20; First Kabler Decl. ¶¶ 7–8; Compl. Ex. D; Defs.' Joint Counter-Statement ¶ 17. Meanwhile, the Commonwealth continued to deduct money from Mr. Kabler's wages and give that money to Union Defendants for months after his resignation. First Kabler Decl. ¶¶ 11–12. These undisputed facts constitute state action that forced Mr. Kabler into continued support of and association with an organization he had never wanted to be a part of or support, even after his resignation.

Even if Union Defendants' recent claim were true—that the money withheld from Mr. Kabler's wages was pursuant to a "private contract" (and Mr. Kabler has already demonstrated it is not)—Union Defendants do not explain—nor do they cite any case law or statute supporting—how the Commonwealth could be authorized to withhold money pursuant to a private contract, nor how the Commonwealth's "enforcing" a private contract for Union Defendants would not involve state action. *See* Union Defs.' Br. 10; *see also Jackson v. Galan*, 868 F.2d 165, 167–68 (5th Cir. 1989) (garnishment of wages by sheriff pursuant to state law was state action); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (state action where state garnished private

employees' wages); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (state action for state garnishment of bank account).

C. The Individual Union Defendants Remain Proper Parties on All Counts At This Time

Union Defendants argue that the individual union officers named as defendants, Wendell W. Young, IV, Peg Rhodes, and Michele L. Kessler, should be dismissed as parties to Mr. Kabler's civil rights claims. But these union officers remain proper parties both because they are state actors under the joint action test, as alleged in the complaint, and because there is no entitlement to dismissal even if they are redundant.

As discussed above, Union Defendants misunderstand the law governing when private individuals and entities may be sued under Section 1983 for having acted under color of law. Here, all allegations, including those relevant to state action, are made against both the Union and the union officers, *see* Compl. ¶¶ 12–14, 21, 34–78, ECF No. 1, and the undisputed record establishes state action under Third Circuit law. Despite Union Defendants' claims, there are specific allegations relating to the union officers. *See, e.g.*, Compl. ¶¶ 31, 61–67, 68–78 & Ex. B. Moreover, there is no entitlement to dismissal even if the union officers were duplicative. "Dismissal is not

required . . . ." *Doe v. Se. Delco Sch. Dist.*, 140 F. Supp. 3d 396, 401 (E.D. Pa. 2015). As such, this Court need not and should not dismiss these state actors at this time.[4]

CONCLUSION

Because the undisputed evidence in the record and the applicable law supports Mr. Kabler, he is entitled to judgment on Count Two and to the relief that he seeks in his motion for partial summary judgment: a refund of all union membership dues unconstitutionally withheld from his wages after July 17, 2018.

Dated: September 13, 2019

Respectfully Submitted,

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[4] Even if this Court accepts Union Defendants' argument with respect to dismissal of individual defendants, it should not dismiss those individual defendants as to Count Four, and Union Defendants have made no argument to that effect.

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that the foregoing brief complies with the 25-page limit authorized by this Court. *See* Order ¶ 5, ECF No. 45.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 13, 2019, I electronically filed the foregoing, and the accompanying attachments and declaration, with the Clerk of Court using the Court's CM/ECF system, which will send electronic notification of the filing to all counsel of record in this matter, who are ECF participants, and that constitutes service thereon pursuant to Local Rule 5.7.

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