IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. KABLER, JR.,	**:**	**No. 1:19-CV-0395**
	:	
Plaintiff,	**:**	**UNION DEFENDANTS'**
	:	**BRIEF IN OPPOSITION**
	:	**TO PLAINTIFF'S**
v.	**:**	**MOTION FOR PARTIAL**
	:	**SUMMARY JUDGMENT**
	:	
UNITED FOOD AND COMMERCIAL	**:**	**(Electronically Filed)**
WORKERS UNION, LOCAL 1776	**:**	
KEYSTONE STATE, et al.,	**:**	Complaint Filed 03/06/19
	:	Trial Date: Not set.
Defendants.	**:**	Judge Sylvia H. Rambo

UNION DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

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[1] All unpublished cases cited in this Brief are attached hereto as Exhibit "1."

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I. PROCEDURAL HISTORY

On March 6, 2019, John R. Kabler ("Plaintiff" or "Mr. Kabler"), a Commonwealth employee working as a liquor store clerk for Defendant Pennsylvania Liquor Control Board ("PLCB"), filed a four-count federal complaint alleging three claims under 42 U.S.C. § 1983 ("Section 1983") for purported violations of his First and Fourteenth Amendment rights (Counts One through Three), as well as a state common law claim for fraudulent representation (Count Four).

Plaintiff asserts his Section 1983 claims against Defendants United Food and Commercial Workers Union, Local 1776 Keystone State ("Local"); United Food and Commercial Workers Union, Pennsylvania Wine and Spirits Council ("Council"); Wendell W. Young, IV, the President of the Local ("Mr. Young"); Michele L. Kessler, the Secretary-Treasurer of the Local ("Ms. Kessler"); and Peg Rhodes, the former and now-retired Staff Representative and Vice President of the Local ("Ms. Rhodes") (collectively the "Union Defendants").[2] The individually-named Local officers (Mr. Young, Ms. Kessler, and Ms. Rhodes) are sued in their official and individual capacities. Finally, Plaintiff asserts a fraudulent misrepresentation claim

[2] Plaintiff also asserts these Section 1983 claims against the Commonwealth of Pennsylvania; the PLCB; Thomas W. Wolf, the Governor of Pennsylvania; Timothy Holden, the Chairman of the PLCB; Michael Newsome, the Secretary of the Office of Administration; and, Anna Marie Kiehl, Chief Accounting Officer for the Commonwealth of Pennsylvania and Deputy Secretary for the Office of Comptroller Operations (collectively the "Commonwealth Defendants.")

against all the Union Defendants, except the Council. The root of these claims stems from Plaintiff's contention that he involuntarily became a member and was forced to remain so as a condition of his employment.

On May 6, 2019, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Union Defendants filed a motion to dismiss ("Motion to Dismiss") all declaratory and equitable claims for relief against all Union Defendants for lack of jurisdiction, all Section 1983 claims asserted against Mr. Young, Ms. Kessler, and Ms. Rhodes as inappropriate parties, and the fraudulent misrepresentation claim against all Union Defendants for failure to state a claim as a matter of law. On May 20, 2019, Union Defendants filed a Brief in Support of the Motion to Dismiss. On the same dates, the Commonwealth Defendants filed a motion to dismiss and later a brief in support, seeking to dismiss all claims asserted against them.

On May 22, 2019, this Court issued an order to show cause why Defendants' motions to dismiss should not be converted into motions for summary judgment under Federal Rule of Civil Procedure 56 (hereinafter "Rule 56"). After receipt of the parties' responses, this Court issued an order converting the motions to dismiss into motions for summary judgment and established a schedule for the parties to file briefs in support of their respective motions for summary judgment and joint statements of material facts.

Consistent with that order, on July 19, 2019, Union Defendants filed a motion for summary judgment ("Motion"), seeking dismissal of all claims asserted against them, along with Defendants' Joint Statement of Material Facts (hereinafter "Dfs. Jt. St."), Declarations of Mr. Young, with exhibits, Ms. Rhodes, a Second Declaration of Mr. Gold, with exhibits, and a supporting brief.

On July 19, 2019, Plaintiff filed a Cross Motion for Partial Summary Judgment ("Cross Motion"), seeking partial relief with respect to Count Two of his Complaint, a Statement of Material Facts ("Pls. St."), and a supporting Brief ("Pl. Brief"). In his Cross Motion, and his supporting Brief, Plaintiff argues that he deserves judgment, in part, on his claim challenging the constitutionality of maintenance of membership provision in the 2016-2019 collective bargaining agreement ("2016-2019 CBA") between the Commonwealth and the Local as permitted under the Public Employe Relations Act, 43 P.S. §§ 1101.101-1101.2301 ("PERA" or "Act 195").[3] Specifically, Plaintiff argues that, in purported violation of the First and Fourteenth Amendments of the U.S. Constitution, the Union Defendants unconstitutionally required him to remain a union member and continued to take dues deductions after he requested to leave the Local.

[3] As explained in Defendants' Joint Answer to Plaintiff's Cross Motion for Partial Summary Judgment, Plaintiff's Cross Motion does not seek all the relief sought in Count Two of his Complaint.

In response to Plaintiff's Cross Motion, Union Defendants and Commonwealth Defendants now file a Joint Answer in Opposition to Plaintiff's Cross Motion ("Answer to Cross Motion"), Defendants' Joint Counter-Statement of Material Facts in Opposition to Plaintiff's Cross Motion for Summary Judgment ("Df. Jt. Cr.-St"), and the Union Defendants' file their Brief in Opposition to Plaintiff's Cross Motion ("Brief in Opposition to Cross Motion") and a Second Declaration of Peg Rhodes ("Rhodes Second Decl.").

For reasons outlined in these papers, along with the arguments outlined in Union Defendants' Brief in Support of Their Motion for Summary Judgment ("Df. Brief in Support of Motion"), Plaintiff is not entitled to partial judgment on Count Two of his Complaint. The record evidence as presented by Plaintiff fails to establish that the Local required Plaintiff to remain a member after he resigned membership or that he was required to continue dues deductions based on the maintenance of membership provision in the 2016-2019 CBA or the PERA. In fact, the record evidence demonstrates that the Local did not enforce maintenance of membership with respect to Plaintiff, but instead simply abided by the requirements of the dues deduction card signed by Plaintiff when he became a member of the Local. Furthermore, Plaintiff fails to demonstrate the required state action necessary to maintain his Section 1983 claim where the Union Defendants are private entities and private individuals which were merely enforcing a dues authorization card. For

these reasons, Plaintiff's Cross Motion fails both as a matter of fact and law.

II. STATEMENT OF FACTS[4]

A. Bargaining Agents, PERA, and the Collective Bargaining Agreement.

The Local and the Council are employee organizations under the PERA. (*Jt. St.*, ¶ 4; *Pls. St.*, ¶¶ 2, 3; *Df. Jt. Cr.-St.*, ¶¶ 2, 3.) The Local and the United Food and Commercial Workers Union, Local 23, under the rubric of the Council, represented a variety of employees working for the PLCB. (*Jt. St.*, ¶ 4; *Pls. St.*, ¶¶ 4, 5; *Df. Jt. Cr.-St.*, ¶¶ 4, 5.) On or about the end of April 2018, the Local merged with Local 23 and became the United Food and Commercial Workers Union, Local 1776 Keystone State. (*Jt. St.*, ¶ 5.)

The Council and the Commonwealth have entered into a Collective Bargaining Agreement ("CBA") that outlines the terms and conditions of employment for bargaining unit employees working for the PLCB. (*Jt. St.*, ¶¶ 11, 65; *Pls. St.*, ¶ 11; *Df. Jt. Cr.-St.*, ¶ 11.) The term of the prior CBA ran from July 1, 2016 through June 30, 2019. (*Jt. St.*, ¶ 11 *Pls. St.*, ¶ 11; *Df. Jt. Cr.-St.*, ¶ 11.)

Article 4 of the prior CBA, titled "Maintenance of Membership and Dues Checkoff," included provisions regarding membership in the Local, dues deduction, and fair share fees. (*Jt. St.*, ¶ 12; *Pls. St.*, ¶¶ 12-13; *Df. Jt. Cr.-St.*, ¶¶ 12-13.) Article

[4] This represents a summary of the facts, which are detailed at length in Defendants' Joint Statement of Material Facts and Defendants' Joint Cross-Statement of Material Facts.

4, Section A states in its entirety:

> 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 employe organization within the 15 days prior to the expiration of this Agreement upon written notice by certified mail, (return receipt requested) to the Employer and the Union.

(*Jt. St.*, ¶ 13; *Pls. St.*, ¶ 12; *Df. Jt. Cr.-St.*, ¶ 12.)

Article 4, Section A is consistent with provisions in PERA regarding maintenance of membership. (*Jt. St.*, ¶ 14; *Pls. St.*, ¶ 11; *Df. Jt. Cr.-St.*, ¶ 11.) PERA defines "Maintenance of membership" as follows:

> "Maintenance of membership" means that all employes who have joined an employe organization or who join an employee organization in the future must remain members for the duration of a collective bargaining agreement so providing with the proviso that any such employe or employes may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement.

43 P.S. § 1101.301(18). PERA further provides:

> Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition.

43 P.S. § 1101.705. Finally, Article IV of PERA grants public sector bargaining unit employees the right to join and participate in a union or not join and participate, "except as may be required pursuant to a maintenance of membership provision of a collective bargaining agreement." 43 P.S. § 1101.401.

Article 4 of the 2016-2019 CBA included provisions regarding dues deductions. Article 4, Section B stated in its entirety:

> The Employer agrees to deduct dues and initiation fees, as defined in Article III, Section 301, Paragraph 11 of Act 195. Said deductions shall be made from the wages upon proper written authorization from the employee. The Union shall certify to the Employer the amount of Union dues to be deducted biweekly, and dues at this rate shall be deducted for each biweekly pay period for which the member is paid. Dues shall also be deducted from back pay awards and from pay received to supplement workers' compensation to the extent monies are available after appropriate deductions are made.

(*Jt. St.*, ¶ 18; *Pls. St.*, ¶ 13; *Df. Jt. Cr.-St.*, ¶ 13.) Article 4, Section C provided "[t]he Employer further agrees to deduct from the wages of employees having executed the authorization in Section B of this Article an annual assessment, if any, upon certification of the assessment by the Union to the Employer." (*Jt. St.*, ¶ 19; *Pl. St.*, ¶¶ 11, 13 *Df. Jt. Cr.-St.*, ¶¶ 11, 13.)

B. Plaintiff's Membership in the Local.

On April 10, 2017, Plaintiff was hired as a liquor store clerk for the PLCB by the Commonwealth, and, therefore, subject to the terms and conditions of employment in the 2016-2019 CBA. (*Jt. St.*, ¶ 21; *Pls. St.*, ¶ 10; *Df. Jt. Cr.-St.*, ¶¶ 10, 21.) On the same day, Plaintiff attended a new employee orientation and signed a membership application that included a political action committee ("PAC") contribution authorization and a dues deduction authorization. (*Jt. St.*, ¶¶ 22, 29; *Df. Jt. Cr.-St.*, ¶¶ 21-28.)

On June 27, 2018, the U.S. Supreme Court issued its decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). In *Janus*, the Supreme Court reversed its earlier precedent and held that requiring non-union members to pay fair share fees as a condition of employment "violates the First Amendment and cannot continue." *Id*. at 2486.

On or about July 17, 2018, Plaintiff sent a letter to the Local resigning his union membership as well as a letter to the Commonwealth requesting that dues deductions cease and advising *that he had resigned his union membership*. (*Jt. St.*, ¶¶ 46-47 *Pls. St.*, ¶ 15; *Df. Jt. Cr.-St.*, ¶¶ 15, 30) (emphasis added.) On August 10, 2018, during a telephone conversation with Mr. Gold about his request, Plaintiff was advised that he could revoke his dues deduction authorization during his next revocation window. (*Jt. St.*, ¶ 52; *Df. Jt. Cr.-St.*, ¶ 33.)

Under the terms of the dues deduction authorization signed by Plaintiff, as interpreted by the Local, and his membership anniversary date of April 10, 2017, Plaintiff's next dues deduction revocation window would occur between February 24, 2019 and March 11, 2019 -- thirty (30) to forty-five (45) days before his membership anniversary. (*Jt. St.*, ¶¶ 34, 53; *Df. Jt. Cr.-St.*, ¶ 35.) Consistent with this, Mr. Gold contacted Plaintiff on March 5, 2019, on his own initiative, since Plaintiff had previously made the Local aware of his wish to stop dues deduction. (*Jt. St.*, ¶ 56; *Df. Jt. Cr.-St.*, ¶ 38.) Just two days later, on March 7, 2019, Plaintiff

served the Local and the above-named union officers, with the Complaint at issue in this lawsuit. (*Jt. St.*, ¶ 59; *Df. Jt. Cr.-St.*, ¶ 41.)

On or about April 2, 2019, Mr. Young, President of the Local, sent a letter to Plaintiff confirming that he was no longer a member and his dues deductions will cease effective April 10, 2019. (*Jt. St.*, ¶ 62; *Df. Jt. Cr.-St.*, ¶ 44.) Mr. Young's letter references the "multiple times" that the Local "contacted [Plaintiff] and explained [his] rights and [the Local's] dues revocation policy." (*See Jt. St.*, ¶ 62; *Df. Jt. Cr.-St.*, ¶ 44.) On April 10, 2019, Liana Reed, an employee of the Local, sent and emailed a letter to Ed Phillips, the Chief of the Office of Labor Relations, to cease dues deductions for Plaintiff. (*Jt. St.*, ¶ 63; *Df. Jt. Cr.-St.*, ¶ 45.) Subsequently, the Local contacted the Commonwealth and confirmed that Plaintiff's dues deductions had ceased. (*Jt. St.*, ¶ 64; *Df. Jt. Cr.-St.*, ¶ 46.) In June 2019, the Local ratified a new collective bargaining agreement that does not contain maintenance of membership language. (*Jt. St.*, ¶ 65; *Df. Jt. Cr.-St.*, ¶ 47.)

III. STATEMENT OF QUESTIONS INVOLVED

1. Pursuant to Rule 56, should this Court deny Plaintiff's Cross Motion regarding Count Two because the record evidence and the law do not establish that the Union Defendants required him to remain union member after he resigned his membership in the Local or that the Union Defendants continued dues deductions

based on the maintenance of membership provision of the 2016-2019 CBA or the PERA?

Suggested Answer: Yes.

2. Pursuant to Rule 56, should this Court deny Plaintiff's Cross Motion regarding Count Two because the Union Defendants were simply enforcing the dues authorization card signed by Plaintiff, which constitutes a private contract and does not involve the state action necessary for a Section 1983 claim?

Suggested Answer: Yes.

3. Pursuant to Rule 56, should this Court deny Plaintiff's Cross Motion regarding Count Two against the individually-named Union officers—Mr. Young, Ms. Kessler, and Ms. Rhodes—because, as private parties, they are not appropriate defendants in a Section 1983 claim?

Suggested Answer: Yes.

IV. ARGUMENT

A. Legal Standard for a Motion for Summary Judgment Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

To prevail on a motion for summary judgment, the moving party must establish that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Construing all evidence submitted in the light most favorable to the non-moving party, *Matsushita Electric*

Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), the movant must prevail if there are no genuinely disputed issues of essential material facts that can support a verdict for the non-moving party. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If a reasonable jury cannot return a verdict for the non-moving party, no genuine issue of material fact exists. *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 860 (3rd Cir. 1990), *cert. denied* 111 S. Ct. 1584 (1991).

Once a case has been made in support of summary judgment, the party opposing the motion has the affirmative burden of coming forward with specific facts "evidencing a need for trial." *See* Fed. R. Civ. P. 56(e). "Wholly speculative assertions will not suffice" to defeat a motion, *Jersey Central Power and Light Co. v. Lacy Township*, 772 F.2d 1103, 1109 (3rd Cir. 1985) *cert. denied* 475 U.S. 1013 (1986), nor will "a[n] alleged or hypothetical factual dispute." *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2nd Cir. 1990).

B. Because There Is No Evidence Demonstrating That Plaintiff Remained a Union Member After He Requested to Withdraw Membership or Continued to Have Union Dues Deducted Based on the Maintenance of Membership Provisions in the 2016-2019 CBA or the PERA, His Motion for Partial Summary Judgment Is Legally Deficient and This Court Should Deny It.

The gravamen of Plaintiff's motion for partial summary judgment of Count Two is that "Defendants continued to consider Plaintiff a union member and to seize

union dues from his wages for nearly nine months after he resigned." (*Pl. Brief*, at 1.) Plaintiff further argues that his continued payment of union dues was based on the maintenance of membership provisions in the CBA that PERA authorized. (*Pl. Brief*, at 4.) Plaintiff, however, has presented no evidence that he remained a member of the Local after he requested to leave other than the April 2, 2019 letter "confirming" that he was no longer a union member. Nor does the record evidence support his claim that the Local continued to have the Commonwealth Defendants deduct union dues from his paycheck pursuant to the maintenance of membership provisions of the 2016-2019 CBA.

In Plaintiff's Statement of Material Facts, he asserts that after he sent his July 17, 2018 letter to the Local, "[n]o Union Defendant responded in writing to or honored Plaintiff's union membership resignation letter until or about April 2, 2019…." (*Pl. St.*, ¶ 18; *but see Df. Jt. Cr.-St.*, ¶¶ 18, 44.) He further states that the "[Local's] president, Defendant Young, wrote that Plaintiff's request would be honored, and union dues would cease to be deducted from his wages as of April 10, 2019." (*Pl. St.*, ¶ 18; *but see Df. Jt. Cr.-St.*, ¶¶ 18, 44.) While the record evidence demonstrates that Plaintiff did not receive a letter confirming his membership ended until the Local's April 2, 2019 letter, it does not support his claim that he remained a union member after he requested to end union membership. (*Df. Jt. Cr.-St.*, ¶¶ 18, 44.) Nor has Plaintiff presented any other evidence that he remained a member after

he requested and the Local received his July 17, 2018 letter asking to cease such membership.

Instead, Plaintiff's claim that his membership continued after the Local's receipt of his July 17, 2018 letter rests entirely upon the fact that the Local did not provide written confirmation to him regarding his resignation of membership until he received the Local's April 2, 2019 letter. (*Pl. St.*, ¶ 18; *but see Df. Jt. Cr.-St.*, ¶¶ 18, 44.) But the April 2nd letter does not state that his membership ended effective April 10, 2019; instead, its opening sentence simply states that "[w]e are writing to confirm that you are no longer a member of UFCW Local 1776KS." (*Pl. St.*, ¶ 18; *but see Df. Jt. Cr.-St.*, ¶¶ 18, 44.) The letter merely acknowledged that his membership ceased, and Plaintiff has presented no other evidence that he remained a member after the Local's receipt of his July 17, 2018 letter. More to the point, Plaintiff has failed to cite to any legal authority supporting his claim that the Local had an obligation to send him any correspondence confirming its receipt of his membership resignation.[5]

Similarly, Plaintiff has presented no evidence that the Local continued to take dues deductions from his paycheck based on the maintenance of membership

[5] In fact, under private sector federal labor law, resignation from union membership is in no way contingent on the union acknowledging the same. Instead, union member's resignation, when sent by mail, is effective the day after it is mailed. Specifically, the effective time and date of the resignation is 12:01 a.m. local time the day after it is mailed. *Pattern Makers (Michigan Model Mfrs. Assn.)*, 310 NLRB 929, 930 (1993); *United Parcel Service, Inc.*, 346 NLRB 360 (2006).

provision in the 2016-2019 CBA. Instead, dues deductions continued based on the dues authorization form Plaintiff signed on April 10, 2017, which included a dues revocation window that did not arise until eight (8) months later. (*Jt. St.*, ¶¶ 29, 48, 53; *Df. Jt. Cr.-St.*, ¶¶ 33-35, 38-39, 42.) Under the terms of the dues authorization form, Plaintiff was afforded an opportunity to revoke his dues authorization on at least an annual basis. (*Jt. St.*, ¶ 33; *Df. Jt. Cr.-St.*, ¶¶ 25, 26, 35, 42.) The Local interpreted the dues deduction language on the card to provide every member at least one revocation window per year, occurring thirty (30) to forty-five (45) days before their membership anniversary. (*Jt. St.*, ¶ 34 *Df. Jt. Cr.-St.*, ¶¶ 25, 26.)

There is no evidence whatsoever that Plaintiff's membership status after July 17, 2018, was determined by maintenance of membership provisions found in the 2016-2019 CBA. (*See Jt. St.*, ¶¶ 13-20; *Df. Jt. Cr.-St.*, ¶¶ 25, 26, 35, 42.) Instead, Plaintiff's status was governed by the terms of the membership application and dues deduction authorization that he signed. (*Id*.) Upon receiving Plaintiff's July 17, 2018 letter, the Local telephoned Plaintiff and informed him that he could not end dues deductions unless he makes an appropriate request during his next dues revocation window, which would arise in mid-February to early March 2019. (*See Jt. St.*, ¶¶ 52-53; *Df. Jt. Cr.-St.*, ¶¶ 32-35.) When that dues revocation window approached, the Local contacted Plaintiff to advise him of that fact. (*Jt. St.*, ¶ 56; *Df. Jt. Cr.-St.*, ¶ 38.) Rather than sending a letter to make that request, Plaintiff filed his

Complaint during his revocation window and the Local treated that Complaint as an appropriate and timely request. (*Jt. St.*, ¶¶ 59, 60; *Df. Jt. Cr.-St.*, ¶¶ 41-42.)

Despite Plaintiff's claim to the contrary, the Local did not enforce the maintenance of membership provision. If it had, Plaintiff would have been required to submit a request to revoke dues authorization within fifteen (15) days before the expiration of the 2016-2019 CBA and the Local would have continued receiving dues from him until the end of the contract on June 30, 2019. (*See Jt. St.*, ¶ 60; *Pl. St.* ¶¶ 11, 12; *Df. Jt. Cr.-St.*, ¶¶ 11, 12.) That did not happen because the Local was only enforcing Plaintiff's signed dues authorization card, not the maintenance of membership provision in the 2016-2019 CBA or the PERA.

Under Rule 56, a moving party must establish that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering such a motion, this Honorable Court must construe all evidence submitted in the light most favorable to the non-moving party, and the moving party may only prevail if there are no genuinely-disputed issues of essential material facts. *Matsushita*, 475 U.S. at 587. In this case, Plaintiff has failed to present sufficient evidence to demonstrate that he either remained a member after the Local's receipt of his July 17, 2018 letter or that the Local was enforcing the maintenance of membership provision against him. Without such evidence, he cannot establish his constitutional claim challenging the maintenance of membership

provision in the 2016-2019 CBA or the PERA.

For these reasons, Plaintiff's reliance upon *McCahon v. Pennsylvania Turnpike Comm'n*, 491 F. Supp. 522 (M.D. Pa. 2007), is misplaced. In *McCahon*, union members employed by the Pennsylvania Turnpike Commission sought to cease union membership when a strike was imminent. *Id*. at 527. Their union expressly refused to allow them to leave, relying upon the maintenance of membership provision in the collective bargaining agreement. *Id*. at 525. The union members filed a complaint, seeking, in part, a preliminary injunction, to allow them to cease membership and stop paying dues—which would result in them being non-members and paying fair share fees. *Id*. Ultimately, the district court granted the union members' request for a preliminary injunction. *Id*. at 529.

McCahon is easily distinguishable to this case. Unlike the *McCahon* plaintiffs, Plaintiff has presented no evidence that he remained a member of the Local after the latter received his July 17, 2018 letter and the record evidence demonstrates that the Local did not rely upon maintenance of membership to continue dues deductions. Furthermore, *McCahon* is a non-precedential decision decided before *Janus*. In a recent decision, a district court found that a California statute limiting a union members' rights to leave a union except within a specific revocation period did not violate the First Amendment. *Seager v. United Teachers L.A.*, 2:19-cv-00469-JLS-DFM, 2019 U.S. Dist. LEXIS 140492 (C.D. Cal. August 14, 2019).

Because Plaintiff has no evidence that he in fact remained a member after the Local received his July 17, 2018 letter or that dues deductions continued under the maintenance of membership provision of the 2016-2019 CBA, this Court should deny his Cross Motion.[6]

C. Because the Record Evidence Does Not Support Any State Action on the Part of the Commonwealth Regarding Union Defendants' Conduct, Plaintiff's Count Two Fails as a Matter of Law.

To state a claim under Section 1983, a plaintiff must establish: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation of that right was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Thus, a prerequisite to a successful claim under Section 1983 is that the challenged action must have been performed under "color of state [law]." 42 U.S.C. § 1983. In actions against a private party, the plaintiff must show "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar v. Edmonson Oil*, 457 U.S. 922, 937 (1982). This means the plaintiff must establish both that the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or a person for whom the State is

[6] Because Plaintiff has not presented evidence that he remained a union member after the Local's receipt of his July 17, 2018 letter or that he was required to pay union dues pursuant to the 2016-2019 CBA's maintenance of membership provision, he lacks standing to challenge the constitutionality of that provision in that CBA or in PERA.

responsible" and that the party charged with the deprivation is "a person who may be fairly said to be a state actor." *Id.*

It is well-settled law that for purposes of Section 1983, labor unions are private entities, not state actors, even though unions are regulated by statutes and regulations. *Slater v. Susquehanna Cnty.*, 613 F. Supp. 2d 653, 660 (M.D. Pa. 2009); *Talley v. Feldman*, 914 F. Supp. 501, 512 (E.D. Pa. 1996). Because a labor union is a private entity, a plaintiff may only successfully sue a labor union for an alleged constitutional violation if he presents facts that would demonstrate that "*the government significantly encouraged the labor union to engage in the constitutional violations.*" *Talley*, 914 F. Supp. at 512 (emphasis added); *see also*, *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1137 (3rd Cir. 1995); *Slater*, 613 F. Supp. 2d at 660. As stated in *Lugar*, a Section 1983 plaintiff may satisfy the state action requirement by showing that a private defendant "acted together with or … obtained significant aid from state officials." *Lugar*, 457 U.S. at 937.

Based on this reasoning, federal courts have refused to extend liability to private entities or individuals for purported violations of constitutional amendments, such as the First Amendment, when there are insufficient allegations or facts that they acted under color of state law. *See Jackson v. U.S. Postal Serv.*, No. 4:18CV500 RLW, 2019 U.S. Dist. LEXIS 49096, *14 (E.D. Mo. Mar. 25, 2019) (dismissing Section 1983 claims against Postmaster General in her official and individual

capacities for violations of the First and Fourteenth Amendments); *Bullock v. Bimbo Bakeries USA*, No. 1:09-CV-1902, 2010 U.S. Dist. LEXIS 41185, *16-17 (M.D. Pa. Feb. 4, 2010) (finding a bakery company and one of its employees were private actors and therefore not liable under Section 1983); *Slater*, 613 F. Supp. 2d at 660 (dismissing Section 1983 claims against union and its business agent for violations of the First and Fourteenth Amendments because they were private actors); *Talley*, 941 F. Supp. at 512 (dismissing plaintiff's First and Fifth Amendment claims against union because he failed to demonstrate that the governmental defendant significantly encouraged the union to engage in constitutional violations).

Because there is no evidence that Plaintiff was forced to remain a union member after the Local's receipt of his July 17, 2018 letter or continued taking dues deductions from his paycheck based on the maintenance of membership provision of the 2016-2019 CBA, he has failed to demonstrate state action by the Commonwealth or the Local to establish liability under Section 1983. This conclusion is further supported by the fact that the Commonwealth did not (1) draft the Local's membership application and dues authorization form or otherwise advise the Local about the contents of its membership application, dues authorization form, or any materials it provided on membership, non-membership, dues deductions, or fair share fees; (2) draft, direct, or advise the Local about what to say or write to bargaining unit employees about membership or non-membership in the Local; or

(3) direct or advise the Local on its decisions regarding Plaintiff's request to cease membership and dues deductions. (*Jt. St.*, ¶¶ 26-28, 42, 44, 54-55, 61; *Df. Jt. Cr.-St.*, ¶¶ 29, 36-37, 43.) These were all decisions made by the Local, a private entity, and, therefore, lack any state action sufficient for a Section 1983 claim.

While the Commonwealth did inform Plaintiff that he was unable to end dues deductions until fifteen (15) days before the expiration of the 2016-2019 CBA (*see* Exhibit C to *Complaint*), the Local interpreted the dues authorization card to allow him to cease dues deductions during his next annual revocation window period which occurred at the time he filed his Complaint. (*Jt. St.*, ¶ 60; *Df. Jt. Cr.-St.*, ¶ 26.) That was an interpretation and decision of the Local alone without any input from the Commonwealth. (*Jt. St.*, ¶¶ 34, 53, 61; *Df. Jt. Cr.-St.*, ¶ 43.) Under such facts, there simply is no state action on the part of the Commonwealth. Instead, these are the actions of the Local and Plaintiff --both private parties.

Courts considering First Amendment claims challenging dues deductions made pursuant to union authorization cards have concluded that no necessary state action was involved and, therefore, dismissed plaintiff's claims. *See, e.g., Belgau v. Inslee*, 359 F. Supp. 3d 1000 (W.D. Wash. 2019) (plaintiff "failed to show that the contents of the agreements are in any way attributable to the State" as the "Union, a private entity, drafted the agreements and asked Plaintiff to sign them."). Furthermore, at least one federal appellate court considering a Section 1983 claim

involving dues authorization cards has concluded, relying upon *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991), that "the First Amendment does not preclude enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law." *Fisk v. Inslee*, 759 Fed. Appx. 632, 633 (9th Cir. 2019).

Finally, district courts, considering a regime existing prior to *Janus* and addressing a preliminary injunction motion to terminate dues deductions, have held that plaintiffs' challenging a waiver of their rights post-*Janus* could not establish a likelihood of success on the merits. In *Smith v. Superior Court, County of Contra Costa*, the court held:

> Smith wants *Janus* to stand for the proposition that any union member can change his mind at the drop of a hat, invoke the First Amendment, and renege on his contractual obligation to pay dues. Far from standing for that proposition, *Janus* actually acknowledges in its concluding paragraph that employees can waive their First Amendment rights by affirmatively consenting to pay union dues. *Id.* That's what Smith did, and he is likely on the hook to pay dues through the end of the contractual period (November 30, 2018). Smith argues his consent to pay wasn't "knowing" before *Janus* because he couldn't yet have known or understood the rights the case would clarify he had. But it's not the rights clarified in *Janus* that are relevant to Smith - Smith's First Amendment right to opt out of union membership was clarified in 1977, and yet he waived that right by affirmatively consenting to be a member of Local 2700.

No. 18-cv-05472-VC, 2018 U.S. Dist. LEXIS 196089, at *2-3 (N.D. Cal. Nov. 16, 2018); *see also Cooley v. Calif. Statewide Law Enforcement Ass'n*, No. 2:18-cv-02961-JAM-AC, 2019 U.S. Dist. LEXIS 12545, at *9-10 (E.D. Cal. Jan. 25, 2019) ("This Court is not persuaded by [plaintiff]'s arguments that the . . . application is

not a valid contract . . . Therefore, this Court finds [plaintiff] is not likely to succeed on the merits of his First Amendment claim as underpinned by an invalid contract or invalid waiver of rights."); *Belgau*, 359 F. Supp.3d at 1016. The *Belgau* court stated:

> Plaintiffs' assertions that the agreements are not valid because they had not waived their First Amendment rights under *Janus* in their authorization agreements because they did not know of those rights yet, is without merit. Plaintiffs seek a broad expansion of the holding in *Janus.* *Janus* does not apply here - *Janu*s was not a union member, unlike the Plaintiffs here, and *Janus* did not agree to a dues deduction, unlike the Plaintiffs here.

Id.

The language of the membership application and dues authorization form signed by Plaintiff, as set forth in detail above, constitutes a valid waiver of his First Amendment rights. Plaintiff affirmatively consented to pay union dues, and *Janus* does not alter that fact. Because Plaintiff voluntarily waived his rights when he agreed to become a member and have dues deducted from his paycheck, this Honorable Court should deny his Cross Motion for Partial Summary Judgment and grant the Local's Motion for Summary Judgment.

Because there was no state action on the part of the Commonwealth, Count Two fails as a matter of law with respect to all Union Defendants and this Court should deny Plaintiff's Motion for Partial Summary Judgment and all relief sought thereunder.

D. Because Mr. Young, Ms. Kessler, and Ms. Rhodes Are Not Proper Parties to the Section 1983 in Count Two and This Claim Is Legally Deficient, Plaintiff's Motion for Partial Summary Judgment Should Be Denied.

As stated in Section V.C, *supra*, private parties, such as a union or its officers, can only be liable under Section 1983 if a state actor significantly encourages them to engage in a constitutional violation. Furthermore, federal courts have found that the Section 1983 claims brought against individuals in their official capacities are generally "redundant of the claims" against the entity for which they are a part. *Damiano v. Scranton Sch. Dist.*, 135 F. Supp. 3d 255, 268 (M.D. Pa. 2015). Official-capacity suits … generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

For that reason, when a plaintiff has sued the entity in question directly, the claims against an official sued solely in her official capacity are merely nominal and should be dismissed with prejudice. *See, e.g.*, *Damiano*, 135 F. Supp. 3d at 258 (dismissing with prejudice Section 1983 claims brought against school board members in their official capacity); *Donovan v. Pittston Area Sch. Dist.*, No. 3:14-1657, 2015 U.S. Dist. LEXIS 78097, *12-13 (M.D. Pa. June 17, 2015 (same); *Swedron v. Baden Borough*, No. 08cv1095, 2008 U.S. Dist. LEXIS 94891, *11 (W.D. Pa. Nov. 21, 2008 (dismissing Section 1983 brought against police officers in their official capacities); *Brice v. City of York*, 528 F. Supp. 2d 504, 516 n.19

(M.D. Pa. 2007) ("[C]laims against state officials in their official capacities merge as a matter of law with the municipality that employs them."). Dismissal is warranted without regard to the merits or sufficiency of plaintiff's claims. *See Burton v. City of Philadelphia*, 121 F. Supp. 2d 810, 812-13 (E.D. Pa. 2000) (dismissing claims against individual defendants even when those allegations "suffice[d] to state a [Section] 1983 [claim] against [defendants] in their official capacities.")

Here, Plaintiff has sued Mr. Young, Ms. Kessler, and Ms. Rhodes in their official and individual capacities for purported violations of the First and Fourteenth Amendment. However, in this case, there is no evidence that the Commonwealth significantly encouraged the individually-named Union Defendants to engage in constitutional violations. As explained in Section V.C *infra*, the Commonwealth was not involved in the purported speech by the individual Union Defendants.

Plaintiff, therefore, has failed to demonstrate that the Commonwealth Defendants significantly encouraged Mr. Young, Ms. Kessler, or Ms. Rhodes, in an official or individual capacity, to engage in purported constitutional violations. Furthermore, at best, the purported statements or other conduct attributed to them in the Complaint were ostensibly made in their official capacities as officers of the Local. As discussed *supra*, federal courts have dismissed Section 1983 claims against private individuals sued in their official capacity as such claims are redundant when the entity for whom the individual works is a party to the litigation.

For these reasons, this Court should deny Plaintiff's Motion for Partial Summary Judgment with respect to Count Two to the extent those claims are asserted against Mr. Young, Ms. Kessler, and Ms. Rhodes.

V. CONCLUSION

Based on the above, this Court should deny Plaintiff's Motion for Partial Summary Judgment and the relief sought thereunder against the Union Defendants.[7]

Respectfully submitted:

WILLIG, WILLIAMS & DAVIDSON

s/ John R. Bielski

JOHN R. BIELSKI, ESQUIRE
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
Office: 215-656-3652
Facsimile: (215) 561-5135
jbielski@wwdlaw.com

Counsel for Union Defendants

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[7] As stated above and in Defendants Joint Answer to Plaintiff's Cross Motion for Partial Summary Judgment, Plaintiff does not seek all relief sought in Count Two of his Complaint, but only partial relief. To the extent Plaintiff, however, seeks all relief sought in Count Two, despite his representation to the contrary in his Cross Motion, such a request should be denied based on this Brief and the Union Defendants' Brief in Support of Their Motion for Summary Judgment.