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

JOHN R. KABLER, JR.,	**:**	**No. 1:19-CV-0395**
	:	
Plaintiff,	**:**	**BRIEF IN SUPPORT**
	:	**OF UNION DEFENDANTS'**
v.	**:**	**MOTION TO DISMISS**
	:	
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 SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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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 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). The Complaint is not a class-action.

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 Vice President of the Local ("Ms. Rhodes") (collectively the "Union Defendants").[1] 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 against all the Union

[1] 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.")

Defendants, except the Council. The root of these claims stems from Plaintiff's allegation that he was misinformed that membership in the Local was a condition of his employment.

On May 6, 2019, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (hereinafter "Rule 12(b)(1)" and "Rule 12(b)(6)") the Union Defendants filed a motion to dismiss ("Motion") 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. In support of this Motion, Union Defendants attached the Declaration of Andrew Gold and now file their brief in support of its Motion.

II. STATEMENT OF FACTS[2]

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

The Local and the Council are employee organizations under the Public Employee Relations Act, 43 P.S. §§ 1101.101-1101.2301 ("PERA" or "Act 195"). The Local and the United Food and Commercial Workers Union, Local 23, under

[2] To the extent this Motion is presented pursuant to Rule 12(b)(6), Union Defendants must accept as true the factual allegations presented in the Complaint. However, Union Defendants may and did submit additional evidence in support of this Motion that is presented pursuant to Rule 12(b)(1).

the rubric of the Council, represent a variety of employees working for the PLCB. (*See* Complaint, ¶ 11.) 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. (*See* Complaint, ¶ 11 n.1.)

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. (*See* Complaint, ¶ 21.) The term of the current CBA runs from July 1, 2016 through June 30, 2019. (*See* Complaint, ¶ 22; Exhibit A to Complaint.)

Article 4 of the CBA, titled "Maintenance of Membership and Dues Checkoff," includes provisions regarding membership in the Local, dues deduction, and fair share fees. (*See* Complaint, ¶ 23; Exhibit A to Complaint.) Article Four, 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 employee 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.

(*See* Complaint, ¶ 23; Exhibit A to Complaint.)

Article 4, Section A is consistent with provisions in PERA regarding maintenance of membership. (*See* Complaint, ¶ 25.) 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 CBA includes provisions regarding dues deductions. Article 4, Section B states 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.

(*See* Complaint, ¶ 23; Exhibit A to Complaint.) Article 4, Section C states that "[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." (*See* Complaint, ¶ 8; Exhibit A to Complaint.)

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 CBA. (*See* Complaint, ¶¶ 11, 15, 27.) During his employee orientation on the same day, Ms. Rhodes purportedly informed Mr. Kabler that "union membership was a condition of employment and that his employment would be terminated if he did not become a union member and begin paying union dues."[3] (*See* Complaint, ¶¶ 28, 71.b.) Based on this information, Mr. Kabler claims, he signed a union authorization card. (*See* Complaint, ¶ 29.) Shortly thereafter, Mr. Kabler received a letter from the Local which read, in pertinent part: "It is a condition of employment that you become a member in good standing with [the Local]…." (*See* Complaint, ¶ 31; Exhibit B to Complaint.) The letter enclosed a copy of his union membership card. (*See* Complaint, ¶ 31; Exhibit B to Complaint.)[4]

On June 27, 2018, the U.S. Supreme Court issued its decision in *Janus v.*

[3] While not relevant to a motion to dismiss filed pursuant to Rule 12(b)(6), Union Defendants categorically deny the truth of this allegation.

[4] There is nothing in the Complaint indicating that Plaintiff ever challenged his membership in the Local until he sent his letter to the Local on July 27, 2018.

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, Mr. Kabler sent a resignation letter to the Local along with a copy to the Commonwealth. (*See* Complaint, ¶ 32, Exhibit C to Complaint.) On or about July 25, 2018, the PLCB sent an email to Plaintiff informing him that the "UFCW contract only allows … employees to withdraw[] membership during the 15 day period prior to the expiration of the Agreement (June 16-30, 2019)." (*See* Complaint, ¶ 33; Exhibit D to Complaint.)

On or about April 2, 2019, Mr. Young, President of the Local, sent a letter to Mr. Kabler informing him that he is no longer a member and his dues deductions will cease effective April 10, 2019. (*See* Declaration of Andrew Gold, ¶ 3; Exhibit A to Declaration.)[5] 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* Declaration of Andrew Gold, ¶ 3; Exhibit A to Declaration.) 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 Mr.

[5] The Local granted Plaintiff's request to revoke his membership and agreed to cease his dues deductions on his two-year anniversary as an employee at the PLCB. The Local did not wait until the expiration date of the current CBA (*i.e.*, June 30, 2019).

Kabler. (*See* Declaration of Andrew Gold, ¶ 4; Exhibit B to Declaration.) Subsequently, the Local contacted the Commonwealth and confirmed that Mr. Kabler's dues deductions have ceased. (*See* Declaration of Andrew Gold, ¶ 5.)

III. STATEMENT OF QUESTIONS INVOLVED

1. Pursuant to Rule 12(b)(1), should this Court dismiss with prejudice all declaratory and equitable claims against the Union Defendants advanced in the Section 1983 claims when Plaintiff lacks standing to assert those claims?

Suggested Answer: Yes.

2. Pursuant to Rule 12(b)(6), should this Court dismiss the individually-named Union officers—Mr. Young, Ms. Kessler, and Ms. Rhodes—when they are inappropriate parties for Plaintiff's Section 1983 claims?

Suggested Answer: Yes.

3. Pursuant to Rule 12(b)(6), should this Court dismiss Plaintiff's common law fraudulent misrepresentation claim in its entirety against all Union Defendants when it is jurisdictionally precluded by PERA and/or the only appropriate claim for relief is a duty of fair representation claim?

Suggested Answer: Yes.

IV. ARGUMENT

A. Legal Standard for a Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6).

A motion to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction challenges a court's authority to hear the matter brought by a complaint. *See Mortesen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977). Under Article III of the United States Constitution, the judicial power of the United States extends only to "cases" or "controversies." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III— 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id*. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiff's particular legal rights.'" *Id*. (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

Accordingly, a court's subject-matter jurisdiction depends on the existence of an actual case or controversy. *Bagby v. Beal*, 606 F.2d 411, 413 (3rd Cir. 1979). Under Rule 12(b)(1), the plaintiff bears the burden of proving by a preponderance of the evidence, the existence of subject-matter jurisdiction. *Davis v. Wells Fargo*, 824 F.3d 333, 349 (3rd Cir. 2016).

A challenge to jurisdiction under Rule 12(b)(1) may proceed either as a facial challenge, asserting that the allegations in the complaint are insufficient to establish subject-matter jurisdiction, or a factual challenge, arguing "that there is no subject matter jurisdiction because the facts of the case … do not support the asserted jurisdiction." *Constitution Party v. Aichele*, 757 F.3d 347, 358 (3rd Cir. 2014). "A facial attack … is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court…." *Id*. at 358. A factual challenge, however, is one in which "a court may weigh and 'consider evidence outside the pleadings.'" *Id*. (quoting *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3rd Cir. 2000)).

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "A 12(b)(6) motion tests the sufficiency of the factual allegations contained in the complaint." *Betz v. Temple Health Sys.*, 679 Fed. Appx. 137, 142 (3rd Cir. 2016) (citing *Kost v. Kazakiewicz*, 1 F.3d 176, 183 (3rd Cir. 1993)).

To survive a motion under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl., Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555*. A complaint need not include "detailed factual allegations." *Twombly, 550 U.S. at 555*; *Iqbal*, 556 U.S. at 678. A complaint must, however, set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if . . . [the] actual proof of those facts is improbable and . . . recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556 (internal quotations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. *Iqbal*, 556 U.S. at 678.

In reviewing a Rule 12(b)(6) motion, a court is "required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to [plaintiff.]" *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3rd Cir. 2005) (citing *Worldcom, Inc. v. Graphet, Inc.*, 343 F.3d 651, 653 (3rd Cir. 2003). Legal conclusions drawn from those facts, however, are not afforded such deference. *Iqbal*, 556 U.S. at 678.

B. Because Kabler Is No Longer a Member and No Longer Pays Union Dues, He Lacks Standing to Assert Claims for Declaratory and Injunctive Relief.

This Court has Article III jurisdiction to hear a claim only if the plaintiff has standing. *Common Cause of Pa. v. Pa.*, 448 F.3d 249, 257-58 (3rd Cir. 2009). A "plaintiff must demonstrate standing separately for each form of relief sought."

Friends of the Earth, Inc. v. Laidlaw Env'tl Servs., 528 U.S. 167, 185 (2000). To establish Article III standing, a plaintiff must demonstrate:

> (1) An injury in fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant): and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Common Cause of Pa., 558 F.3d at 258 (internal quotations omitted). A plaintiff seeking forward-looking forms of relief such as declaratory or injunctive relief "must show that he is 'likely to suffer future injury' from the defendant's conduct." *McNair v. Synapse Group, Inc*., 672 F.3d 213, 223 (3rd Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

Here, Plaintiff seeks prospective relief in the form of declaratory judgments and injunctions. With respect to declaratory relief, Plaintiff seeks declarations that (1) Defendants' practice of requiring membership in the Local as a condition of public employment unconstitutionally abridges Mr. Kabler's rights under the First and Fourteenth Amendments; (2) Article 4 of the CBA between the Local and the Commonwealth, on its face and as applied, unconstitutionally abridges Mr. Kabler's rights under the First and Fourteenth Amendments; (3) the maintenance of membership provisions of PERA found at 43 P.S. §§ 1101.301(18), 1101.401 and 1101.705 violate the First and Fourteenth Amendments; (4) the First and Fourteenth Amendments prevent Defendants from restricting Plaintiff's right to resign from

union membership at any time; (5) the First and Fourteenth Amendments prevent Defendants from seizing Plaintiff's funds without his affirmative consent or waiver of First Amendment rights; and, (6) the Fourteenth Amendment requires due process of law to provide meaningful notice concerning Plaintiff's rights and a meaningful opportunity to object to dues deductions in the context of proper process for asserting such an objection.

With respect to injunctive relief, Plaintiff seeks to enjoin Defendant from (1) engaging in any of the activities enumerated in his request for declaratory relief; and, (2) enforcing Article 4 of the CBA or any subsequent and similar provision between the Local and the Commonwealth which requires Plaintiff to become or remain a member of the Local.[6]

The Local notified Kabler on April 2, 2019, that he was no longer a member of the Union and dues deductions would cease effective April 10, 2019. (*See* Declaration of Andrew Gold, ¶ 3; Exhibit A to Declaration.) Furthermore, the Local contacted an agent of the Commonwealth to cease dues deductions and later

[6] Confusingly, the Plaintiff states that he seeks to enjoin Defendants "from … ***requiring*** Defendants" to expunge Article 4 of the CBA, honor Plaintiff's resignation from union membership, and refund Mr. Kabler all union dues deducted from his wages from at least April 10, 2017, along with interest. (*See* Complaint, Section B of Prayer for Relief.) Presumably, Plaintiff means that he seeks to enjoin Union Defendants to require them to (1) expunge Article 4 of the CBA; (2) honor Plaintiff's resignation; and, 3) refund Mr. Kabler's union dues. However, the first is duplicative of his request to enjoin enforcement of Article 4 for which he lacks standing as a non-member; the second has occurred and therefore is moot; and the third and last is duplicative of his request for monetary relief, seeking all dues deductions since he became a union member and should be dismissed.

confirmed that those dues deductions had ended. (*See* Declaration of Andrew Gold, ¶¶ 4, 5; Exhibit B to Declaration.) As a non-member who pays no dues, Plaintiff is no longer subject to the provisions of Article 4 or PERA regarding maintenance of membership or dues deduction, or any purported practices of the Local regarding the same. Thus, he lacks standing to obtain prospective declaratory or injunctive relief.

1. Kabler Lacks Standing to Obtain Relief Under the Declaratory Judgment Act.

In *Golden v. Zwickler*, the Supreme Court considered whether a Section 1983 plaintiff had standing to request a declaratory judgment that a New York State statute barring anonymous election hand-billing violated the First Amendment. 394 U.S. 103, 117 (1969). Plaintiff had distributed handbills in 1964 decrying votes of a Congressperson, and wanted to do so again in 1966. *Id*. at 106. However, the Congressperson had left office and accepted a seat as a judge of the Supreme Court of New York. *Id*. at 109 n.1.

While the trial court granted plaintiff's request, on appeal, a unanimous Supreme Court reversed, holding that the federal court had no jurisdiction to issue a declaratory judgment in the matter since it was "wholly conjectural" that the Congressperson would ever serve as a candidate for Congress and, therefore, no case or controversy existed at the time the lower court considered the issue. *Id*. at 109. In reaching its conclusion, the Supreme Court began:

> "The federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field."

Id. at 108 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947)). To determine if an actual case or controversy exists under the Declaratory Judgment Act, the Supreme Court reasoned, "… the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

In applying this legal standard, the Supreme Court concluded:

> Since the New York statute's prohibition of anonymous handbills applies to handbills directly pertaining to election campaigns, and the prospect was neither real nor immediate of a campaign involving the Congressman, it was wholly conjectural that another occasion might arise when [Appellee] might be prosecuted for distributing the handbills referred to in the complaint. His assertion in his brief that the former Congressman can be "a candidate for Congress again" is hardly a substitute for evidence that this is a prospect of immediacy and reality.

Id. at 109. *Golden* remains good law and the Third Circuit has cited it with approval in a Section 1983 claim, alleging a violation of the First Amendment. *See, e.g.*, *Versarger v. Twp. of Clinton*, 984 F.2d 1359, 1360 (3rd Cir. 1992) (concluding that there was no case or controversy because "it was highly unlikely" that a volunteer

firefighter removed from a volunteer fire company under its bylaws "would ever again be a member of the Hose Company….").

Kabler has no grounds to seek declaratory relief in this matter because he is no longer a union member and no longer pays union dues. Therefore, he is no longer subject to the provisions of Article 4 of the CBA or PERA regarding maintenance of membership or dues deduction, or the practices of the Local as they relate to the same.[7] As is the case in *Versager, supra,* there is simply no way that Plaintiff would ever return as a member of the Local. Thus, he cannot claim he will be harmed by PERA or the Local's practices regarding maintenance of membership or dues deductions.

For these reasons, Plaintiff's requests for declaratory judgments should be dismissed with prejudice as there is no actual case or controversy with respect to such relief.

2. Kabler Lacks Standing to Obtain Injunctive Relief.

As is the case with a request for a declaratory judgment, a plaintiff seeking an injunction must demonstrate the existence of an actual case or controversy that is not speculative, justifying such prospective relief. *See Lyons*, 461 U.S. at 101 (1982); *see also, ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 301 (3rd Cir. 2012) (finding

[7] Nor can Plaintiff or any other bargaining unit employee working at the PLCB ever be subject to fair share fees as *Janus* precluded such deductions.

there was no actual case or controversy for issuance of an injunction when the corporation against which the injunction was sought had dissolved).

Lyons involved an individual who was injured by a City of Los Angeles ("City") police officer during an arrest in which the police officer subjected plaintiff to a chokehold. *Lyons*, 461 U.S. at 97-98. Plaintiff sought monetary damages as well as injunctive relief. *Id*. at 97. Plaintiff requested the district court enjoin the City's policy permitting police officers to employ chokeholds. *Id*. at 98. The district court granted the injunction and the Court of Appeals affirmed. *Id.* at 99. After the Supreme Court granted *certiorari*, the chief of police of the City prohibited some chokeholds and imposed a six-month moratorium for others except in limited circumstances. *Id*. at 100.

In reviewing the Court of Appeals affirmance of the district court's grant of injunctive relief, the Supreme Court argued that injunctive relief is only proper if "[p]laintiffs … demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *Id*. at 101 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Supreme Court reiterated that "'[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects.'" *Id*. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488 (1974)). It further rejected the notion that

a plaintiff with standing to seek monetary damages for prior constitutional wrongs has standing for prospective injunctive relief. *Id*. at 104. Because the Supreme Court found that plaintiff was not facing immediate harm, he lacked standing for injunctive relief. *Id*. at 105.

In reaching this conclusion, the Supreme Court rejected the idea that the police conduct fell within the rule that "a claim does not become moot where it is capable of repetition but evades review…." *Id*. at 109. "[T]he capable-of-repetition doctrine applies only in exceptional situations, and ***generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality***." *Id*. (emphasis added). It emphasized that injunctive relief "is unavailable absent a showing of irreparable injury, ***a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again***…." *Id*. at 111 (citing *O'Shea*, 414 U.S. at 502). Finally, because Lyons had an adequate remedy at law—his claims for monetary relief—the Supreme Court found unavailing the argument that without an injunction, police misconduct cannot be challenged. *Id*.

Even more so than in *Lyons*, Plaintiff lacks an actual case or controversy to confer standing for injunctive relief. The Local granted his request to revoke his membership and the Commonwealth, upon request by the Union, ceased dues deductions. Thus, he is no longer subject to the provisions of Article 4 and PERA

regarding maintenance of membership and dues deduction, or any purported practice of the Local concerning the same. Because he is under no "real or immediate threat that [he] will [be] wronged again," he has no grounds for prospective injunctive relief. Like the volunteer firefighter in *Versanger*, it is "highly unlikely" that Plaintiff "would ever again be a member of the [Local]."

For these reasons, all Plaintiff's requests for injunctive relief should be dismissed with prejudice as he has no actual case or controversy.

C. Because Mr. Young, Ms. Kessler, and Ms. Rhodes Are Inappropriate Parties for Section 1983 Claims, Those Claims Should Be Dismissed with Prejudice.

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). 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 by the Supreme Court, 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 v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

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. United States Postal Serv.*, 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*, 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).

Furthermore, claims under Section 1983 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); *accord Hill v. Borough of Kutztown*, 455 F.3d 225, 233 n.9 (3rd Cir. 2006). 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.*, 2015 U.S. Dist. LEXIS 78097, at *12-13 (M.D. Pa. June 17, 2015) (same); *Swedron v. Baden Borough*, 2008 U.S. Dist. LEXIS 94892, *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, Mr. Kabler has sued Mr. Young, Ms. Kessler, and Ms. Rhodes in their official and individual capacities for purported violations of the First and Fourteenth Amendment. As private individuals and not government employees, Plaintiff must allege sufficient facts to establish that the Commonwealth Defendants "significantly encouraged [these union officials] to engage in the constitutional violations." *Talley,* 914 F. Supp. at 512.

In this case, the allegations are woefully deficient to establish that the individually-named Union Defendants engaged in conduct that constitutes state action. The only specific allegation against Ms. Rhodes is that she purportedly informed Mr. Kabler at a PLCB employee orientation that membership in the Local was required as a condition of employment. (*See* Complaint, ¶¶ 28, 71.b.) The only specific allegation against Mr. Young and Ms. Kessler is that they were the authors of the letter sent to Mr. Kabler shortly after his PLCB orientation. (*See* Complaint, ¶¶ 31, 71.a.) There is no allegation that the Commonwealth Defendants significantly encouraged Mr. Young, Ms. Kessler, or Ms. Rhodes to make their respective statements. Nor is there any allegation in the Complaint that Mr. Young, Ms. Kessler, or Ms. Rhodes encouraged, supported, or authorized the PLCB's email sent to Mr. Kabler on July 25, 2018, rejecting his request to revoke his union membership

and end his dues deductions until he reached the 15-day window before the expiration of the CBA on June 30, 2019.[8]

Under these allegations, Plaintiff 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 the purported constitutional violations. Furthermore, at best, all of 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 all these reasons, this Court should dismiss with prejudice Plaintiff's Section 1983 claims asserted against Mr. Young, Ms. Kessler, and Ms. Rhodes.

D. Because the Fraudulent Misrepresentation Claim Is Barred By PERA or Is Otherwise an Inappropriate Claim, It Should Be Dismissed with Prejudice.

The gist of Plaintiff's fraudulent misrepresentation claim is that Union Defendants erroneously told him that that he must become a member despite

[8] In fact, Mr. Young sent a letter to Mr. Kabler on April 2, 2019, informing him that he was no longer a member and that his dues deductions would cease effective April 10, 2018—more than two months prior to the 15-day window at the expiration of the CBA. (*See* Declaration of Andrew Gold; Exhibit A to the Declaration).

language to the contrary in PERA and the CBA. (*See* Complaint, ¶¶ 68-78.) Specifically, Plaintiff alleges in Count Four that "Union Defendants represented to Mr. Kabler that membership in [the Local] was a condition of employment." (*See* Complaint, ¶ 71.) Additionally, Plaintiff quotes Article IV of PERA in his Complaint, which reads, in its entirety:

> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision of a collective bargaining agreement.

(*See* Complaint, ¶ 24.) He further alleges that Union Defendants should have known that it was incorrect to state that union membership was a condition of employment based on provisions in Article 4 of the CBA. (*See* Complaint, ¶ 73).

PERA lists the types of conduct by a union and its agents that constitute unfair labor practice charges. 43 P.S. § 1101.1201. Under PERA, "employe organizations, their agents, or representatives, or public employes are prohibited from … [r]estraining or coercing employes ***in the exercise of the rights guaranteed in Article IV*** of this act." 43 P.S. § 1101.1201(b)(1) (emphasis added). Thus, violations of Article IV, quoted *supra*, constitute an unfair labor practice charge.

Furthermore, it is well-established that the Pennsylvania Labor Relations Board is delegated with exclusive jurisdiction to decide unfair practice cases arising

under PERA. *Pa. Labor Rels. Bd. v. Williamsport Area Sch. Dist.*, 406 A.2d 329, 331 (Pa. 1979); *Hollinger v. Dep't of Public Welfare*, 365 A.2d 1245, 1249 (Pa. 1976); *Koch v. Bellefonte Area Sch. Dist.*, 388 A.2d 1114, 1115 (Pa. Cmwlth. 1977); *Penn Hills School Dist. v. Penns Hill Educ. Ass'n*, 383 A.2d 1301, 1303 (Pa. Cmwlth. 1978). PERA itself provides that, with respect to unfair labor practice charges:

> The PLRB is empowered . . .to prevent any person from engaging in any unfair practice listed in Article XII of this act. ***This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, law, or otherwise***.

43 P.S. § 1101.1301 (emphasis added).

Additionally, to the extent a plaintiff has a state cause of action against a union that does not constitute an unfair labor practice charge, "a public employee's sole remedy in the courts is an action against the union for breach of its duty of fair representation. . ." *See Waklet-Riker v. Sayr Area Educ. Ass'n*, 656 A.2d 138, 140, 141 (Pa. Super. 1995); *see also, Martino v. Transp. Workers' Union, Local 234*, 480 A.2d 242, 252 (Pa. 1984), *Casner v. AFSCME*, 658 A.2d 865, 870 (Pa. Cmwlth. 1995); *Runski v. AFSCME Local 2500*, 598 A.2d 347, 350 (Pa. Cmwlth. 1991) *aff'd without op.* 642 A.2d 466 (Pa. 1994); *Reisinger v. Dep't of Corrs.*, 568 A.2d 1357, 1360 (Pa. Cmwlth. 1990); *Speer v. Philadelphia Hous. Auth.*, 533 A.2d 504, 506 (Pa. Cmwlth. 1987).

Here, Plaintiff alleges that the Local misinformed him about his rights to join or not join the Union. As alleged, such conduct constitutes an unfair labor practice and the PLRB has exclusive jurisdiction over the claim. Even assuming it is not an unfair labor practice charge, Pennsylvania courts have long-established that the only state claim a public employee may make against his union is a duty of fair representation claim. In either event, Plaintiff's fraudulent misrepresentation claim fails as a matter of law.

For all these reasons, this Court should dismiss with prejudice Count Four, the fraudulent misrepresentation claim.

V. CONCLUSION

Based on the above, this Court should dismiss with prejudice Plaintiff's claims for declaratory or injunctive relief, the Section 1983 claims against the individually-named Union Defendants, and the fraudulent misrepresentation claim in its entirety.

Respectfully submitted:

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Dated: May 20, 2019

Attorney for Union Defendants

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

JOHN R. KABLER, JR.,	:	
	:	
Plaintiff,	:	
	:	**No. 1:19-CV-0395**
v.	:	
	:	**Judge Rambo**
UNITED FOOD AND COMMERCIAL	:	
WORKERS UNION, LOCAL 1776	:	**Electronically Filed Document**
KEYSTONE STATE, et al.,	:	
	:	*Complaint Filed 03/06/19*
Defendants.	:	

CERTIFICATE OF SERVICE

I, John R. Bielski, Esquire, hereby certify that on the 20th day of May 2019, I caused to be served a true and correct copy of the foregoing document titled UNION DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6) to all counsel of record via ECF.

s/ John R. Bielski

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