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

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

UNION DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO THEIR MOTION FOR AMENDED SUMMARY JUDGMENT.

Dated: September 13, 2019

s/ John R. Bielski

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I. INTRODUCTION

Despite Plaintiff John R. Kabler's desperate attempt in his Brief in Opposition to Union Defendants' Amended Motion for Summary Judgment (hereinafter "Pl.'s Resp. Br.") to make his case appear unique or otherwise distinguishable from the plethora of others filed in federal courts after the United States Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), it is not. To avoid this conclusion, Plaintiff raises several spurious claims, none of which undermine the Union Defendants'[1] argument that they deserve summary judgment in their favor on all the claims asserted against them.

First, Plaintiff's primary contention – that his dues authorization was not valid and that he joined the union involuntarily – is the same contention forwarded in several other post-J*anus* cases, which those courts rejected. *See, e.g.*, *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1012 ("They [plaintiffs] dispute whether the agreements they signed are valid."); *Hernandez v. AFSCME Ca.*, 386 F. Supp. 3d 1300, 1304 (E.D. Cal. 2019) (involving, in part, former union members who sought the return of dues paid pre-*Janus*); *Babb v. Ca. Teachers Ass'n*, 378 F. Supp. 3d 857, 868 (C.D. Cal. 2019) (involving plaintiffs who were former union members

[1] References to the "Union Defendants" throughout includes Defendant Local, Defendant Council, as well as the individually-named Union officers—Defendant Young, Defendant Kessler, and Defendant Rhodes.

forwarding unconstitutional choice arguments, as well as contentions that they were led to believe union membership was a condition of employment).

Second, Plaintiff contends there is something improper about Union Defendants' filing an Amended Motion for Summary Judgment ("Amended Motion") challenging all counts after this Honorable Court converted the Union Defendants' Motion to Dismiss to a Motion for Summary Judgment. However, that Amended Motion for Summary Judgment is consistent with Federal Rule of Civil Procedure 56(b), entitled "Time to File a Motion" which states:

> Unless a different time is set by local rule or the court orders otherwise, **a party may file a motion for summary judgment at any time *until* 30 days *after the close* of all discovery.**

(bold and italics added). While it is highly unlikely this Court is not abundantly aware of which motions to dismiss it converted, and what it denied discovery on, and what additional matters are before it, it is nevertheless clear from Union Defendants' procedural recitation in its prior briefs that it was filing a broader Motion for Summary Judgment than its initial Motion to Dismiss.[2] In fact, Union Defendants notified this Honorable Court and all counsel of their intent to file an

[2] Similarly, Plaintiff filed a Motion for Partial Summary Judgment on Count II that was, of course, not a motion to dismiss that was converted into a motion for summary judgment. Thus, to the extent Plaintiff is arguing he suffered undue surprise by Union Defendants' Amended Motion for Summary Judgment, he had the same amount of notice as Union Defendants (if not more) in responding to their Motion. Union Defendants agree with Plaintiff that judgment as a matter of law is appropriate on Count II, but in favor of Union Defendants, not Plaintiff.

Amended Motion for Summary Judgment in the event conversion was granted. (*See ECF* No. 26, 28).

Third, in an attempt to avoid arguments raised in Union Defendants' Brief in Support of Their Amended Motion contesting Plaintiff's clearly articulated desire to obtain retrospective relief, he now argues that he no longer seeks such relief. In his Responsive Brief, Plaintiff claims he is only seeking: "(1) the difference between the union dues Commonwealth Defendants deducted and Union Defendants received under its "closed shop" policies and the agency fees that would have been deducted had Mr. Kabler been allowed, as the Constitution requires, to be a nonmember of Local 1776; and (2) the full dues deducted against Mr. Kabler's will from the date of his resignation – after *Janus* – until dues deductions ceased." (Pl.'s Resp. Br. at 23.)

However, a review of Plaintiff's Complaint demonstrates otherwise. (*See Compl.*, Count I, ¶ 45 ("…including the return of funds unconstitutionally seized from Mr. Kabler from the date of his hiring…"); Count II, ¶ 54 ("…violate Mr. Kabler's constitutional rights by withholding union dues or fees from him without his affirmative consent…"); Count II, ¶ 55 ("…including the return of funds unconstitutionally seized from Mr. Kabler as far back as his date of hire…"); Prayer for Relief (B) ("c. refund to Mr. Kabler all union dues deducted from his wages from at least April 10, 2017, plus interest thereon."); Prayer for Relief (D) ("…including,

but not limited to, the amount of dues deducted from his wages without Mr. Kabler's affirmative consent and waiver of his First Amendment rights, plus interest thereon…")

Plaintiff's attempt to amend the relief sought in his Complaint through his Responsive Brief is not only improper, but also a bald attempt to distinguish his case from a plethora of post-*Janus* decisions by other courts, rejecting the "unconstitutional choice" argument that Plaintiff unquestionably has included in his Complaint. Plaintiff cannot amend, via brief(s), the clearly-stated relief sought in his Complaint in a futile effort to recast it as one involving a closed union shop – a contention for which Plaintiff has neither pled relief nor provided any proof whatsoever. Instead, this is just another case of a union member upset, post-*Janus*, at having to pay money to a union – whether fees or dues – at a time when compulsory fair share fees were perfectly legal.[3]

With all of the above properly clarified, Union Defendants' submit this Reply in support of their Motion for Summary Judgment and in response and opposition to Plaintiff's Brief in Opposition to Union Defendants' Amended Motion for Summary Judgment.

[3] To the extent Plaintiff is voluntarily withdrawing a portion of the monetary relief he seeks, Union Defendants do not object, although, given the track record for such claims post-*Janus*, Plaintiff's concession is insignificant. Presumably, Plaintiff seeks to modify his claim for relief in an attempt to evade application of the good faith defense, which unquestionably would apply if Plaintiff had adequately established the necessary state action for his claims—which he has not.

II. FACTUAL SUMMATION IN REPLY

Pertinent to this Motion, Plaintiff has admitted that his employee orientation with the Pennsylvania Liquor Control Board ("PLCB") was held on the day he was hired, April 10, 2017. (*See Pl.'s Resp. Facts*, at ¶¶ 21, 22). Plaintiff admits that, during Defendant Rhodes' presentation, he signed his membership application, dues deduction authorization, and PAC contribution authorization. Plaintiff contends that he signed, authorizing all three aspects of the form, involuntarily. (*See Pl.'s Resp. Facts*, at ¶ 36*; Second Declaration of Kabler*, ¶¶ 5, 7, 8). Plaintiff, however, admits that he received the "Welcome Letter" after already signing his membership application. (*See Pl.'s Resp. Facts*, at ¶ 37). Plaintiff also does not dispute that the collective bargaining agreement in effect at the time contained language about the then-lawful agency fee requirements for nonmembers. (*See Pl.'s Resp. Facts*, at ¶ 20; *see also*, ¶ 73 of the Complaint (detailing various references to non-membership in the CBA)). Relatedly, he does not deny receiving the collective bargaining agreement or "Membership Information." (*See Pl.'s Resp. Facts*, ¶¶ 39, 40).

Perhaps more critically, and despite his admitted presence at his employee orientation, Plaintiff failed to specifically deny that both membership and non-membership in the Local was discussed at employee orientations. (*See Pl.'s Resp. Facts*, at ¶ 25). Similarly, Plaintiff failed to specifically deny that during his orientation, one of many conducted by Defendant Rhodes, "neither the

Commonwealth of Pennsylvania, nor its agents or employees, encouraged, discouraged, or otherwise opined on the merits of union membership and employee-elected dues deductions or PAC contributions." (*See Pl.'s Resp. Facts*, at ¶ 27; *see Defendants' Joint Statement of Material Facts* (hereinafter "*Jt. St.*"), ¶ 27). Plaintiff further failed to specifically deny that the Commonwealth of Pennsylvania, its agents, or employees did not assist Defendant Rhodes, as union representative, "or otherwise participate in any aspect of the presentation." (*See Pl.'s Resp. Facts*, at ¶ 28; *see Jt. St.*, ¶ 28).

Plaintiff's counsel instead submitted his own Declaration claiming Kabler lacked information to answer. (*See Declaration of Nathan J. McGrath, Esquire*). However, Plaintiff, who has filed two Declarations and admittedly was present at his own orientation conducted by Defendant Rhodes, failed to deny these allegations.

Plaintiff has further clarified that his July 17, 2018 letter to the Commonwealth and to the Union was not a "mere 'request to rescind'" and was in fact a resignation of union membership. (*See Pl.'s Resp. Facts*, at ¶ 46). Plaintiff further admitted that he notified the Commonwealth and copied the Local advising that he had resigned membership in the Local and wished it to cease dues deduction. (*See Pl.'s Resp. Facts*, at ¶ 47). Plaintiff admittedly never made a previous request

to revoke dues deduction or to request that dues deductions cease. (*See Pl.'s Resp. Facts*, at ¶ 48).

III. ARGUMENT

A. Plaintiff Lacks Standing for His Equitable Relief Claims and Those Claims Are Moot.

Plaintiff focuses entirely on a mootness analysis instead of the standing test cited to and applied by Union Defendants in their brief. (*See Pl.'s Resp. Br.*, at 26-28). This diversion is not unintentional as, unlike with mootness, the party invoking the court's jurisdiction has the burden of establishing standing. *See Common Cause of Pa. v. Pa.*, 448 F.3d 249, 257-58 (3d Cir. 2009). As an initial matter, this Court should grant Union Defendants' motion where Plaintiff has wholly failed to respond to Union Defendants' standing arguments. But more importantly, Union Defendants' motion should be granted because Plaintiff lacks standing to seek prospective relief: he is no longer a union member and pays no union dues or fair share fees. (*See Jt. St.*, at ¶ 63; *Pl.'s Resp. Facts*, at ¶¶ 62, 64). Nor are the provisions in the prior CBA concerning fair share fees and maintenance of membership in the current 2019-2023 CBA, or otherwise applicable to Plaintiff prospectively. (*See Jt. St.*, at ¶ 65).

Regardless of how the argument is packaged – as standing, mootness, or a little bit of both – the positions advanced by Plaintiff were recently rejected by this District Court in other post-*Janus* lawsuits, as well as by the Western District of

Pennsylvania. *See Molina v. Pa. Soc. Servs. Union*, 2019 U.S. Dist. LEXIS 120040, *24-26 (M.D. Pa. July 18, 2019) (dismissing, in a case brought by former union member, claims for declaratory and injunctive relief for lack of standing where it was unlikely such conduct would repeat itself since plaintiff was no longer a union member and no longer employed and, in contrast, analyzed claims for retroactive monetary relief under the mootness standard); *see also*, *Diamond v. PSEA*, 2019 U.S. Dist. LEXIS 112169, *35-39, 58-59 (W.D. Pa. July 8, 2019) (dismissing declaratory and injunctive relief claims, as well as other forms of prospective relief, for mootness and lack of standing); *Hartnett v. PSEA*, 2019 U.S. Dist. LEXIS 83755, *18-23 (M.D. Pa. May 17, 2019) (dismissing declaratory and injunctive relief claims for mootness).

To avoid dismissal of his prospective claims for relief, Plaintiff erroneously claims that the injury he allegedly suffered is capable of repetition because the Union Defendants only ceased deducting dues after commencement of the lawsuit and because they "continue to defend the constitutionality of the wrongful action." (*Pl.'s Resp. Br.*, at 27).

First, the notion that continuing to defend oneself in a lawsuit is tantamount to a reasonable expectation that the complained of action, once ceased, will recommence is too speculative and too tangential for Plaintiff to meet his standing burden. In fact, Plaintiff is no longer a member and pays no dues.

Second, Plaintiff clearly misunderstands the voluntary cessation principle, which does not help him here and which is only applicable to a mootness analysis—not a standing analysis. *See Hartnett*, *supra*, at *7-8; *see also*, *Smith v. Bieker*, 2019 U.S. Dist. LEXIS 99581, at *3 (N.D. Cal. June 13, 2019) (finding plaintiff's challenge moot after, by operation of his membership agreement, the union no longer deducted dues from plaintiff's paycheck where enforcement of the provision was unlikely to recur and where the "voluntary cessation doctrine does not apply because the Superior Court stopped deducting fees by operation of the contract, not because it was responding to Smith's litigation."). In fact, Union Defendants called Plaintiff on March 5, 2019 to inform him that he was within his revocation window, two days prior to the filing of his lawsuit. (*See Jt. St.*, at ¶ 56.)

Regardless, even under a mootness standard, Union Defendants have demonstrated Plaintiff's prospective, equitable relief claims are moot. In *Seagar v. United Teachers L.A.*, 2019 U.S. Dist. LEXIS 140492, *3-4 (C.D. Cal. Aug. 14, 2019), just as here, the union processed the plaintiff's revocation of dues deduction and argued that claims for prospective relief were moot. While the plaintiff in *Seagar* did not contest mootness, the court noted that it had previously found a similar challenge moot:

> [B]ecause the individual 'would have to rejoin his union for his claim to be live, which, given his representations in this lawsuit, seems a remote possibility. *Babb v. Ca. Teachers Ass'n*, 378 F. Supp. 3d 857, 886 (C.D. Cal. 2019). Thus, the Court concludes that Plaintiff's claims

> for prospective relief from further dues deductions and her request for relief from further enforcement of [the statute] are moot.

Id., at *5.

Plaintiff has offered no likely, non-speculative basis to believe that Plaintiff would hereafter seek out the Union Defendants to join the union again. Accordingly, this Court should grant Union Defendants' summary judgment motion and dismiss all claims for declaratory, injunctive, or other prospective relief as Plaintiff lacks standing, and because his claims are otherwise moot.

B. Plaintiff Cannot Maintain His Section 1983 Claims Asserted Against Union Defendants.

Plaintiff fails to cite to any dispositive, or even any persuasive authority regarding his failure to establish the requisite level of state action to maintain his Section 1983 claims – the heart of this suit. Plaintiff asks this Court to find the presence of state action sufficient for him to forward his claims without either undisputed, material facts or a sound legal basis. Plaintiff's state action analysis improperly reverses the ultimate burden in this case – his burden to demonstrate state action, as a threshold matter, on the part of a private entity such that a Section 1983 action may proceed against them. (*See Pl.'s Resp. Br.*, at 15-17).

Third Circuit precedent which analyzes when a private entity, such as a union, may be held liable pursuant to Section 1983, as well as more general caselaw analyzing the state actor test in factually relevant cases is wholly absent from

Plaintiff's analysis. Plaintiff relies upon only two cases that contain a substantive state action analysis for the conduct of a private, union entity: *Misja v. PSEA*, 2016 U.S. Dist. LEXIS 186250 (M.D. Pa. Mar. 28, 2016) and *Williams v. PSEA*, 2017 U.S. Dist. LEXIS 62392 (M.D. Pa. April 25, 2017).[4] These cases preceded *Janus* and both involved agency fee objectors.[5] *See id.* Unlike these two cases -- upon which Plaintiff almost exclusively relies -- this Court should, as it must, look to binding, Third Circuit precedent for the proper analysis of whether a private entity or individual, like the Union Defendants here, may be viewed as state actors in the post-*Janus* world of public-sector labor relations. Fortunately, there is such a case.

In *White v. Communications Workers of America*, AFL-CIO, Local 13000, 370 F.3d 346 (3d Cir. 2004), the Third Circuit, affirmed the lower court's finding that there was no state action sufficient to allow the plaintiff to maintain a Section 1983 claim against his union – a private entity. This was so despite the fact that the collective-bargaining agreement contained an exclusivity of representation provision and an agency shop provision negotiated pursuant to the National Labor Relations Act. *Id.* at 347. The plaintiff challenged, in relevant part, that the opt-out procedure infringed his First Amendment right not to associate with the union. *Id.*

[4] Plaintiff otherwise cites to cases that involve Section 1983 claims against public-sector unions in *Janus* and prior to *Janus* arguing without any legal basis, that the mere fact that such claims proceeded supports their argument here. (*See Pl.'s Resp. Br.*, at 12).

[5] Even when agency fees were lawful prior to *Janus*, public employees in Pennsylvania had the right to object on religious grounds regarding whether a union could receive those fees. *See Misja, Williams, supra.*

at 348-49. On appeal, the plaintiff only challenged the lower court's finding that he had not shown state action sufficient to maintain his Section 1983 claim against it. *See id.* at 349-50. The Third Circuit held that state action was not present in such circumstances:

> To establish that challenged conduct was state action, a plaintiff must demonstrate two things. First, the conduct at issue must either be mandated by the state or must represent the exercise of a state-created right or privilege. . . . Second, the party who engaged in the challenged conduct must be a person or entity that can "'fairly be said to be a state actor.'" *Id*. (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 . . .; *see also Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir. 2000). Because we hold that [Plaintiff] has failed to make the second showing required to establish state action, we need not reach the question whether he has made the first.

Id. at 350 (some citations omitted for brevity). Whether a private person or an entity can be a state actor for purposes of Section 1983 depends on "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury [to the plaintiff] is aggravated in a unique way by the incidents of governmental authority." *Id.*; *see also*, *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009) (analyzing the same factors); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1143 (3rd Cir. 1995) (same).[6]

In this case, for the reasons that follow, Plaintiff has failed to meet any of the three prongs. Union Defendants' enforcement or non-enforcement of dues deduction

[6] Both *White* and *Kach* cite *Mark* regarding the three-pronged test. *See White, supra*, at 350; *Kach*, supra, at 646.

authorization and/or their alleged creation of a closed shop arrangement as to Plaintiff are not conduct mandated by the state or an exercise of a state-created right, nor are the Union Defendants state actors.

The plaintiff in *White* argued that the statute's authorization of an agency shop was enough to render the use of the opt-out procedure state action. *White*, 370 F.3d at 350-51. The Court's analysis was based, in pertinent part, on a recognition that the agreement between the employer and the union was not mandated by the law – the law only provided a framework for the negotiations. *See id.* at 351.

In its analysis, the Third Circuit emphasized: "If the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning." *Id.* at 351. The Third Circuit likewise rejected the plaintiff's argument that the union was a state actor because the law gives the union bargaining power it would not otherwise have in negotiating the collective bargaining agreement. *Id.* at 351-52 *citing Jackson v. Metro Edison Co.*, 419 U.S. 345 (1974) (finding private utility company was not a state actor in suit alleging constitutional violations where a Pennsylvania regulatory agency gave the utility monopoly power and where the company's use of a state regulation allegedly caused the plaintiff's harm); *Crissman v. Dover Downs Entertainment*, 289 F.3d 231, 247 (3d Cir. 2002) (holding that despite state

commission granting the racetrack a lengthy monopoly in the harness racing market, the actions of the private entity could not be attributed to the state).

Relatedly, in *Kach*, *supra*, the plaintiff, a former public school student, attempted to sue a number of parties, including private parties, pursuant to Section 1983, as well as pursuant to other state law claims. 589 F.3d at 632-33. The defendants included a private security company that the public school contracted with, as well as a security guard the company employed. *Id.* The Third Circuit found that there was no state action as against these private individuals, finding: "Although there is no 'simple line' between state and private actors. . . we have explained that '[t]he principal question at stake is whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.'" *Id.* at 646. (citations omitted). The Third Circuit also described the Plaintiff's burden of showing that the guard was a state actor as "heavy" under the first part of the applicable test and accordingly rejected the contention that the security guard was performing a traditional role of the state. *Id.* at 648.

The Third Circuit further rejected Plaintiff's claim that there was not a sufficiently close nexus "between the state and the *challenged* action of the regulated entity so that the action may be fairly treated as that of the State itself." *Id.* (internal quotations omitted) (emphasis in original). The Court further stated:

> The State will be held responsive 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*.

Id. (other citations omitted; emphasis supplied by quoting Court). This is so because, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Id.* at 649 (other citations omitted; emphasis supplied by quoting Court). The Third Circuit further clarified that the focus is not whether the state exercises control over the private actor at issue, but rather, whether it has "*exercised control over the particular conduct that gave rise to the plaintiff's alleged constitutional deprivation*." *Id.* (emphasis added). Accordingly, the Third Circuit found that the State had no control over the conduct the security guard was alleged to have engaged in and noted that the security guard had not acted on anyone's initiative except his own. *Id.* Although the Third Circuit's analysis only pertained to two of the three tests related to state actors, its rational thoroughly explains where to draw the line for private entities or individuals sued pursuant to Section 1983.

Relying upon the Third Circuit's approach in *White* and the other decisions cited *supra* to the facts of this case would be consistent with other post-*Janus* district court decisions, and even with the pre-*Janus* cases that Plaintiff relies upon (*Misja* and *Williams*), because those cases are clearly distinguishable. *Misja* and *Williams* were decided pre-*Janus* and involved religious objectors to the State's agency fee law. *Williams*, at *1; *Misja*, at *2-4. In contrast, Plaintiff was not an agency fee

payer pre-*Janus*, he was a union member. (*Pl.'s Resp. Facts*, at ¶ 29). His case depends not on statutory mechanisms for agency-fee objectors, as the plaintiffs in *Williams* and *Misja* did, but on the validity of a private agreement with Defendant Local. (*See id.*).

Plaintiff, and organizations committed to forwarding the claims of such plaintiffs, cannot have it both ways. In a pre-*Janus* world, with lawful agency fee statutes on the books and the careful balancing of individual rights against the preferences of the State with regard to the deduction of agency fees, perhaps it made sense to permit Section 1983 claims to be brought against public-sector unions under certain circumstances. In a post-*Janus* world, neither a State nor a public-sector union can require non-members to pay agency fees. Instead, public-sector unions rely primarily upon private agreements with members for their receipt of dues – the tradeoff for such plaintiffs is that there is no longer a State-compelled subsidy of public-sector unions and they cannot rely upon federal statutes to sue private entities over what are now private, contractual disputes. Indeed, "[t]he state action element in § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (internal citations omitted). With this in mind, the Third Circuit's application of the state actor analysis in *White* is even more clearly

applicable to public-sector unions who, just like private-sector unions, are no less private entities.

Consistent with relevant Third Circuit precedent, at least one other district court deciding a post-*Janus* case has also found that there was no requisite state action. In *Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1012 (W.D. Wash. 2019), just as here, the plaintiffs disputed the validity of the agreements they signed. Nevertheless, in that case, as here, the plaintiffs' failed "to show that the contents of the agreements are in any way attributable to the State." *Id.* Pertinently, the district court in *Belgau* noted:

> The parties agree that the State Defendants did not play any role in drafting or in the formation of the agreements here. They agree that the Union, a private entity, drafted the agreements and asked the Plaintiffs to sign them…While the Plaintiffs attempt to recast their claim and argue that it is the State deductions that are [*sic*] issue at the same time, they acknowledged that the deductions are constitutional if the agreements are valid. *At its core, then, the source of the alleged constitutional harm is the sufficiency of the agreements, not the procedure for their collection that the State agreed to follow***.**

Id. at 1012-13 (emphasis added). In so noting, it found that the alleged constitutional harm did not actually result from some law, rule, or other policy of the State. *Id.* Further, it found that the union was not a state actor in any event. *Id.* at 1013.

Identical to Plaintiff's claim here, the plaintiffs in *Belgau* alleged that their membership agreements were invalid. *See id.* The district court analyzed each of the Supreme Court's elements of the test for a private party to be determined to have

engaged in state action: public function, joint action, state compulsion, and the governmental nexus test. *Id.* The district court found that the public function test was not met because the union "was functioning as a union." *Id.* The district court found that the joint action test was not met because there was no showing that the government and the union acted in concert where it had not affirmed, authorized, encouraged, or otherwise facilitated the contents of the agreements. *Id.* at 1013-14. The district court found that the state compulsion test also was not met because the state did not exercise coercive power over the union in connection with the membership agreements. *Id.* at 1014. Further, the district court found that the government nexus test was not met because, again, there was no such relationship between the State and the content of the membership agreements. *Id.* at 1015. Critically, since the claims failed at the threshold of the state action test, "no decision is necessary on whether the initial or 2017 membership agreements violate the First Amendment." *Id.*

Not surprisingly, Plaintiff has failed to cite to a single post-*Janus* case in support of his position. After a thorough review of the pertinent case law, the undisputed evidence in this case makes clear that Plaintiff has not and cannot establish the requisite state action to maintain the Section 1983 claims. Even more to the point, whether Plaintiff was confused about what was said to him at his orientation is of no moment – the fact of the matter is that whether Plaintiff is

mistaken, or whether he was genuinely and sincerely confused by what he was told at the employee orientation, is immaterial to his failure to establish state action.[7] *See Kach* at 649 (declining to determine if the plaintiff's constitutional rights were violated since the at-issue defendant was not acting under color of law).

There are essentially two decisions on the part of the Union Defendants that Plaintiff alleges injured him – that the Union coerced him into becoming a member on or about April 10, 2017, and that it allegedly refused to "honor" his resignation of membership in July, 2018 and his request to have dues deductions cease in July, 2018. With regard to the former act, the Union Defendants have established that the Commonwealth had no part whatsoever in Defendant Rhodes' presentation on April 10, 2017, and no part in the creation of the Local's membership application. (*See Jt. St.*, ¶¶ 26, 42, 44).

Moreover, despite Plaintiff's admitted presence at his employee orientation, Plaintiff failed to specifically deny that during his orientation, one of many conducted by Defendant Rhodes, "neither the Commonwealth of Pennsylvania, nor its agents or employees, encouraged, discouraged, or otherwise opined on the merits of union membership and employee-elected dues deductions or PAC contributions." (*See Jt. St.*, ¶ 27; *Pl.'s Resp. Facts*, ¶ 27). Plaintiff further failed to specifically deny

[7] Even less relevant is whether Plaintiff spoke to Andrew Gold, or merely listened to a voicemail, in August, 2019.

that the Commonwealth of Pennsylvania, its agents, or employees did not assist Defendant Rhodes, as union representative, "or otherwise participate in any aspect of the presentation." (*See id.* at ¶ 28). Instead, Plaintiff's counsel submitted a Declaration denying these facts based on an alleged lack of information, but the critical fact is that Plaintiff, who has filed two Declarations and admittedly was present in at least one such orientation conducted by Defendant Rhodes, failed to deny these allegations. (*See id.* ¶¶ 27, 28).

With regard to Plaintiff's claim that the Union Defendants allegedly refused to "honor" his resignation of membership in July, 2018 and his request to have dues deductions cease in July, 2018 -- Plaintiff once again fails to put forth any evidence that the decision to not let him stop dues deductions was not fully within the discretion of the union – a private party. Instead, Plaintiff contends that the Commonwealth responded to his July, 2017 request by, essentially, deferring to Defendant Union, and that that is sufficient, coupled with the maintenance of membership provision in the collective bargaining agreement at that time, to demonstrate state action. (*See Decl. of John R. Kabler in Supp. of Pl.'s Cross Mot. for Partial Summ J.*, at ¶¶ 7-8; *Compl.*, Ex. D). But this fact further highlights the lack of State action on the part of the Union Defendants, since it makes clear that the decision to enforce Plaintiff's dues deduction authorization was the Union Defendants' decision, not the Commonwealth's.

Moreover, to the extent Plaintiff contends in this lawsuit that he has unlawfully been forced to become a union member, in some sort of alleged closed shop scheme (*see Pl.'s Resp. Br.*, at 23, 36), the collective bargaining agreement in effect at the time did ***not*** contain a provision forcing employees to become members, as emphasized by Plaintiff in his Complaint. (*See Compl.*, ¶ 73 ("For example, had Union Defendants merely glanced at Article 4 of the CBA, *for which Mr. Young bargained and signed on behalf of Local 1776*, Union Defendants would have read that public employees are not required to be union members in order to become or remain Commonwealth employees.")). Thus, even if Plaintiff were correct (and he is not) that the union had forwarded such a scheme, he has failed to marshal any facts that the Commonwealth had any role in such a scheme.

Separately, Plaintiff has also failed to adequately dispute the fact that Defendant Union enforced its dues deduction authorization – a private agreement with Plaintiff -- and not the maintenance of membership provision in the prior collective-bargaining agreement. Plaintiff complains that Defendant Union could not have let him out during his annual revocation window after he served his Complaint. (*Pl.'s Resp. Br.*, at 10, 19-21). But, the undisputed facts are that he signed a dues deduction authorization (*Pl.'s Resp. Facts*, at ¶ 29) and that Defendant Union treated Plaintiff's Complaint as a valid revocation of dues deduction instead of making Plaintiff wait until the revocation period pursuant to the maintenance of

membership provision in the CBA. (*Pl.'s Resp. Facts*, at ¶¶ 9, 13, 62, 64); *see also*, *Seagar, supra*, at *3-4 (union treating, just as in this case, service of the plaintiff's complaint as a timely revocation of dues deduction since it was served within the appropriate window).

For all these reasons, Plaintiff fails to carry his initial, threshold burden of showing Union Defendants are state actors such that he can even maintain his Section 1983 claims, and those claims should be dismissed with prejudice.

C. Plaintiff's Section 1983 Claims Asserted Against Individual Union Defendants Are Duplicative and Redundant of His Section 1993 Claims Asserted Against the Local and the Council and Should Be Dismissed.

In the event this Honorable Court denies Union Defendants' Amended Motion for Summary Judgment with respect to the Section 1983 claims as asserted against the Union Defendants (*i.e.*, Defendants Local, Council, Young, Kessler, and Rhodes), the individually-named Union Defendants (Defendants Young, Kessler, and Rhodes) should be dismissed as parties because the claims against them are duplicative and redundant of the claims asserted against the Local and the Council.

As explained in Union Defendants' Brief in Support of Their Amended Motion for Summary Judgment ("Union Defendants' Brief), 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); *accord Hill v. Borough of Kutztown*, 455 F.3d 225, 233 n.9 (3d 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; *Donovan v. Pittston Area Sch. Dist.*, 2015 U.S. Dist. LEXIS 78097, *12-13 (M.D. Pa. June 17, 2015); *Swedron v. Baden Borough*, 2008 U.S. Dist. LEXIS 94891, *11 (W.D. Pa. Nov. 21, 2008); *Brice v. City of York*, 528 F. Supp. 2d 504, 516 n.19 (M.D. Pa. 2007). 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).

In this case, Plaintiff has offered no explanation in his Complaint or his other papers justifying suing the individually-named Union Defendants in either their official *or* individual capacities. Nor has Plaintiff made any distinction between the official and individual capacity claims pressed against them. As Plaintiff notes in his brief, "all allegations, including those relevant to state action, are made against both the Union and the individual Union Defendants." (*Pl.'s Resp. Br.*, at 25). In fact, as stated in Union Defendants' Brief, there is no allegation that the individually-

named Union Defendants took any action other than ones performed as officers of the Local, and, therefore, in their official capacities.

For these reasons, and the reasons outlined in Union Defendants' Brief, this Honorable Court should dismiss with prejudice the Section 1983 claims against the individually-named Union Defendants, whether asserted against them in their official or individual capacity.

D. Plaintiff's State Tort Claim Asserted Against Union Defendants Is Precluded as a Matter of Law.

It is unclear what standard Plaintiff is referencing when he contends that the Union's motion for summary judgment as to the fraudulent misrepresentation claim "does not establish a likelihood to succeed on the merits." (*Pl.'s Resp. Br.* at 28). It is equally unclear that Plaintiff has marshalled any basis why this claim should not be dismissed as a matter of law. Once again, Plaintiff fails to cite any case law in support of his claim that his sole, state law claim is not precluded as a matter of law. Consequently, this Court should disregard Plaintiff's tortured logic on page 30 of his responsive brief. Even more significantly, Plaintiff has also ignored and fails to distinguish binding Pennsylvania case law cited to by Union Defendants in their Brief in Support of Their Amended Motion for Summary Judgment at pages 38-39 which makes clear that the only claim a bargaining-unit member has against his union is a duty of fair representation claim. Plaintiff's failure to even attempt to distinguish these cases speaks volumes.

Additionally, Plaintiff's claim that exclusive jurisdiction under the Public Employee Relations Act, 43 P.S. §§ 1101.101, *et seq.* ("PERA") would only apply "if Union Defendants acknowledge that Mr. Kabler's coercion into union membership was due to a practice of Local 1776 and/or its agents or representatives…" entirely misses the mark. (*Pl.'s Resp. Br.*, at 28-29). Plaintiff essentially argues that PERA's exclusive jurisdiction does not apply unless a union or its agent admit that it engaged in an unlawful act or unless an unlawful practice existed. But PERA's exclusive jurisdiction applies where the contention involves such entities and individuals, not merely when the allegations are provable; PERA's exclusive jurisdiction applies even for one-time unlawful acts that are committed by a covered entity or individual in the performance of their duties as a union or a union representative. *See* 43 P.S. §§ 1101.1201(b), 1101.130. Stated simply, even if a union representative engaged in an unlawful act, that is not synonymous with or otherwise indicative that they acted *ultra vires*, and Plaintiff has failed to dispute the material facts of the Union Defendants in any manner to show otherwise.

IV. CONCLUSION

For all the reasons in Union Defendants' Reply, as well as in their initial Motion, Brief in Support, and other attendant and supportive filings in this case, this Court should grant the Union Defendants' Motion for Summary Judgment in full.