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

FRANCISCO MOLINA, Plaintiff, v. PENNSYLVANIA SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 668, *et al.*, Defendants.	**Case No. 1:19-cv-00019-YK** (Hon. Yvette Kane) --ELECTRONICALLY FILED--

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Francisco Molina ("Mr. Molina") does not wish to draw this case out any longer than necessary. In fact, his case could likely be resolved at some point by summary judgment. But Defendants[1] want an *immediate* resolution and, in their rush to judgment, ask this Court to ignore disputed issues of material fact underlying Mr. Molina's claims and to adopt a sweeping legal conclusion effectively depriving union members of constitutional rights.

This Court should decline the invitation, for at least two reasons. First, this case is not yet ripe for summary judgment. At this stage, Defendants cannot demonstrate an absence of genuine issues of material fact, and they rely on facts unavailable to Mr. Molina. At the very least, this Court should defer summary judgment or grant to Mr. Molina an opportunity to conduct discovery.

Second, Defendants are not entitled to judgment as a matter of law. They essentially ask this Court to adopt a refurbished version of a union argument ridiculed by the Supreme Court in *Janus v. AFSCME, Council 31*—namely, that public employees have "no [free speech] rights." 585 U.S. ___, 138 S. Ct. 2448, 2469 (2018) (quoting union's brief). In Defendants' view, union members can be kept from

[1] Defendant Lehigh County Board of Commissioners ("Lehigh County") filed a summary judgment motion but declined to file its own supporting brief. *See* Lehigh Cty.'s Am. Mot. for Summ. J., at 1, ECF No. 57. Instead, Lehigh County "join[ed] in" and "incorporate[d]" the brief filed by Defendant Pennsylvania Social Service Union, Service Employees International Union, Local 668 ("PSSU"). *Id.*

resigning their membership under collectively bargained "maintenance of membership" provisions and bound by agreements the union recognizes as "invalid," even without provision of truthful information or a meaningful process. This Court should reject Defendants' theory, deny their motions, and proceed as scheduled. *See* Joint Case Mgmt. Plan, ECF No. 49.

COUNTER STATEMENT OF THE CASE

I. COUNTER STATEMENT OF FACTS

Francisco Molina was employed by Lehigh County until August 14, 2018, when he was dismissed. First Am. Compl. ¶ 8, ECF No. 20. He is currently seeking reinstatement and backpay. *Id.* ¶¶ 32–33. Mr. Molina was a "[p]ublic employe," 43 P.S. § 1101.301(2), in a bargaining unit exclusively represented by PSSU. First Am. Compl. ¶ 8; PSSU's Statement of Material Facts ("PSSU's Facts") ¶ 1, ECF No. 55.

PSSU and Lehigh County entered into a collective bargaining agreement ("CBA") containing a maintenance of membership provision prohibiting public-sector employees from resigning their union membership until a 15-day "escape period" at the end of the CBA. First Am. Compl. ¶¶ 12–16. In keeping with this language, Defendants represented to membership—which included Mr. Molina[2]—that such a restriction prevented any membership resignation outside of the escape

[2] PSSU argues that Mr. Molina did not allege that such representations were made to him but only to membership generally. *See* Mem. ("PSSU's Memo"), at 8, ECF No. 56. However, the facts are clear that Mr. Molina was considered a member during the relevant time periods. PSSU's Facts ¶¶ 4–5, ECF No. 55.

period. Decl. of Francisco Molina ("Second Molina Decl.") ¶ 5, filed herewith. PSSU also represented to membership—which included Mr. Molina—that, under the terms of Section 3.3 of the CBA, the union could demand the discharge of any employee who was unwilling or unable to pay monies to the union and that, if a public employee resigned his or her membership, PSSU would no longer provide union representation to that public employee or would force him or her to pay for the costs of representation. First Am. Compl. ¶¶ 18–21; Second Molina Decl. ¶ 5.

As early as 2015, Mr. Molina publicly stated that he desired to resign his PSSU membership. Second Molina Decl. ¶¶ 6–7. No PSSU officials informed him of any right to resign or process for asserting such a right; in fact, one or more PSSU officials told him that he would not have representation if he resigned. *Id.* at ¶ 7.

At a PSSU membership meeting on January 10, 2018—roughly a year before members' escape period—PSSU requested that some members, including Mr. Molina, sign new membership cards because all previously signed cards were "invalid." First Am. Compl. ¶¶ 22–25; Second Molina Decl. ¶ 8. One or more PSSU union officials represented that the new cards would be "litigation proof" after the Supreme Court decided *Janus*. Second Molina Decl. ¶ 8. Mr. Molina was never informed of his relevant First Amendment rights at this meeting. He declined to sign the new card. *Id.*; First Am. Compl. ¶¶ 25–27.

On June 27, 2018—six months before the CBA's escape period—Mr. Molina requested that Lehigh County stop collecting union dues from his paychecks, but he

was told that he had to contact PSSU. First Am. Compl. ¶¶ 28–29. Accordingly, on July 16, 2018, Mr. Molina resigned his union membership by sending a certified letter to PSSU's headquarters, where it was received. *Id.* ¶ 30–31; Revised Decl. of Claudia Lukert ("Lukert Decl.") ¶ 6, ECF No. 29-2. Still, union dues were deducted from Mr. Molina's wages and, on December 5, 2018, Defendants issued Mr. Molina a new union membership card. Second Molina Decl. ¶¶ 12, 18; First Am. Compl. ¶ 35.[3]

By letter dated January 8, 2019—after this civil rights action was initiated—PSSU informed Mr. Molina that it had "received [his] request to withdraw [his] participation in the union" and purported to "refund[ ]" to him "the dues withheld from the July 6, 2018 pay period through the August 17, 2018 pay period (the last pay period dues were received)." First Am. Compl. ¶ 39. The letter did not purport to provide interest on the wrongfully withheld dues. *See* Revised Lukert Decl., Ex. C. It also said nothing about his membership status. *Id.*; First Molina Decl. ¶¶ 19–22, ECF No. 33-2.

II. COUNTER STATEMENT OF PROCEDURAL HISTORY

On February 11, 2019, Mr. Molina filed his First Amended Complaint—the operative complaint in this matter—alleging violations of his civil rights.

On March 4, 2019, Defendants moved for partial dismissal on jurisdictional

[3] Mr. Molina was not the only former member of PSSU to receive this treatment. *See* Decl. of Ryan Walsh ¶¶ 3–4, ECF No. 33-3 ("Walsh Decl."); Decl. of Paul Asturi ¶¶ 3–4, ECF No. 33-4 ("Asturi Decl.").

grounds. ECF No. 28. PSSU also alleged—for the first time—that it had actually considered Mr. Molina a nonmember as early as August 2018, despite provision of a new membership card in December 2018 and without any corroborating communication to Mr. Molina. *See* Mem., at 3, ECF No. 27-1. According to PSSU, it was following a "then-standard procedure for processing member resignations" but took seven months to "process" his request and inform him of its decision. *Id.* at 3–4.

However, PSSU thereafter amended its memorandum of law as well as the accompanying declaration, in order to correct an "inaccuracy." ECF No. 29. Among other changes, the amended versions removed PSSU's previous assertions that it had a procedure for processing membership resignations. *See* Revised Mem., ECF No. 29-1; Revised Lukert Decl.. In response, on April 1, 2019, Mr. Molina filed a brief and requested jurisdictional discovery. ECF No. 33. Discovery was sought, in part, to address Defendants' new assertions that they had considered Mr. Molina a nonmember seven months before informing him or providing a refund. *Id.*

On July 18, 2019, following oral argument, this Court dismissed Count One of the First Amended Complaint and dismissed Count Two only to the extent that Mr. Molina requested recovery of "post-resignation dues." Order, at 1, ECF No. 41. This Court also denied Mr. Molina's request for jurisdictional discovery and dismissed a PSSU official as a defendant. *Id.*

On September 21, 2019, Mr. Molina propounded written discovery requests on Defendants. *See* Decl. of David R. Osborne ("Osborne Decl.") ¶ 6 & Ex. A, filed

herewith. However, on October 7, 2019, this Court stayed discovery in this matter before any responsive documents were received. Thereafter, Defendants filed separate motions for summary judgment on the remaining counts. ECF Nos. 50, 57.

COUNTER STATEMENT OF QUESTIONS INVOLVED[4]

1. Whether Defendants have sustained their burden of demonstrating an absence of genuine issues of material fact.

2. Whether Defendants have demonstrated entitlement to a ruling that neither the union nor the government are required to provide notice of a public employee's rights prior to deducting union payments, that neither are required to seek and obtain a waiver of such rights, and that neither are required to provide procedures facilitating the exercise of such rights.

ARGUMENT

I. DEFENDANTS CANNOT DEMONSTRATE THE ABSENCE OF DISPUTED ISSUES OF MATERIAL FACT AND INSTEAD RELY ON FACTS UNAVAILABLE TO MR. MOLINA

This case is not yet ripe for summary judgment. As further detailed below, Defendants cannot demonstrate an absence of a genuine issue of material fact, and they otherwise rely on disputed facts or facts that are, by their very nature, unavailable to Mr. Molina. Therefore, Defendants' motion should be denied outright, and this matter should proceed as scheduled. Alternatively, this Court should either defer

[4] PSSU's supporting "brief" did not contain a statement of questions involved. *See* Mem., ECF No. 56 ("PSSU's Memo").

summary judgment pursuant to Federal Rule of Civil Procedure 56(d)(1) or grant to Mr. Molina the opportunity to conduct limited discovery pursuant to Rule 56(d)(2).

A. Defendants Cannot Demonstrate That There Are No Disputed Issues of Material Fact

Defendants' statement of material facts contains just seven paragraphs, *see* PSSU's Facts, and most of those paragraphs contain disputed facts. Because Defendants have failed to carry their burden of demonstrating that there are no disputed issues of material fact, this Court should deny summary judgment.

"It is well established that a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 145 (3d Cir. 2004) (citation omitted). Courts examine the record "in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015).

The validity of an agreement involves questions of fact, and disputes as to those facts, when material, preclude summary judgment. *See, e.g.*, *West v. IDT Corp.*, 241 F. App'x 50, 53 (3d Cir. 2007) ("[T]here are several important factual disputes which bear on the binding nature of the agreement. Among these are whether the

parties intended the agreement to be binding, whether their actions following the signing of the agreement, including their performance in conformance with the agreement and representations made to others, clarified any ambiguity as to their intent, and whether the terms of the agreement set forth all the important particulars of the relationship between them. These disputed facts must be, but were not, viewed in the light most favorable to [the nonmovant].").[5]

Here, Defendants have failed to demonstrate that there are no disputed issues of material fact. Most notably, Defendants acknowledge—as does Mr. Molina—the existence of a signed membership card and dues deduction authorization, but they failed to allege or present any evidence concerning the continued *validity* of those agreements, which Mr. Molina contests. PSSU's Facts ¶ 4; Pl.'s Counter Statement of Material Facts ¶ 4, filed herewith. Still, Defendants appear to rely almost entirely on the supposed validity of these agreements in attempting to dispose of Mr. Molina's

[5] *See also Boyington v. Percheron Field Servs., LLC*, No. 3:14-CV-90, 2016 WL 1179216, at *4 (W.D. Pa. Mar. 24, 2016) (applying summary judgment standard in the context of a motion to enforce settlement and concluding that "[the movant] failed to meet its burden of establishing that there were no disputed issues of material fact as to the validity of the settlement agreement or that the terms of the purported agreement were sufficiently definite to be specifically enforced.") (attached hereto); *Joseph Oat Holdings, Inc. v. RCM Digesters, Inc.*, Civ. No. 06-4449, 2009 WL 900758, at *4 (D.N.J. Mar. 31, 2009) ("It is undisputed that the parties wanted to sever relations, but it is disputed whether this document was intended to be the complete written manifestation of all the parties' obligations.") (attached hereto); *Aetna Cas. & Sur. Co. v. Cooper*, Civ. a. Nos. 90-1497, 91-1834, 1991 WL 146923, at *4 (E.D. Pa. July 25, 1991) ("The 'four corners' of the document fail to resolve the present issue.") (attached hereto).

First and Fourteenth Amendment claims. *See* PSSU's Memo, at 1 ("Molina's First Amendment rights were not violated by his own voluntary decision to join Local 668 and contractual agreement to pay membership."), 5 ("Molina's payments of the membership dues he voluntarily agreed to pay did not violate his First Amendment rights."), 9 ("No First Amendment rights were infringed by the State's deduction of the dues he voluntarily authorized.").

Defendants likely avoided raising this issue of material fact because it is clearly in *dispute*: PSSU straightforwardly denied the relevant allegation in the complaint that, on January 10, 2018, PSSU told him and other PSSU members that their membership cards were "invalid." *See* First Am. Compl. ¶ 24; PSSU's Answer to First Am. Compl. ("PSSU's Answer") ¶ 24, ECF No. 47. And one cannot just barrel ahead to summary judgment over an alleged contract when the validity of that contract is in dispute as a matter of fact. *West*, 241 F. App'x at 53; *Boyington*, 2016 WL 1179216, at *4; *Joseph Oat Holdings*, 2009 WL 900758, at *4; *Aetna*, 1991 WL 146923, at *4.

Likewise, Defendants identify only a handful of undisputed facts remotely relevant to Mr. Molina's due process claim—and none touching on Lehigh County's lack of provision of due process. *See* PSSU's Facts ¶¶ 5–7. After whittling them down, this Court is left only with facts that, when Mr. Molina was considered a member, he was entitled to unidentified "rights and benefits of union membership," *id.* at ¶ 5, that he was elected and served as a shop steward for a time, *id.* at ¶ 6, and that PSSU received Mr. Molina's membership resignation letter in July 2018, *id.* at ¶ 7.

Defendants allege nothing to demonstrate that they provided requisite notice, meaningful process, or access to an independent decisionmaker.[6]

Again, Defendants' failure to acknowledge issues of material fact may be because they have affirmatively *denied* many of Mr. Molina's relevant allegations. *See* First Am. Compl. ¶¶ 59–67; PSSU's Answer ¶¶ 59–67. For example, PSSU denied Mr. Molina's allegation that Defendants failed to provide him with "a meaningful opportunity to object to continued seizure of his funds or a clearly defined process for asserting such an objection." First Am. Compl. ¶ 63; PSSU's Answer ¶ 63. And they denied Mr. Molina's allegation that "Defendants put the burden on Mr. Molina to learn, assert, and vindicate his rights with respect to union payments." First Am. Compl. ¶ 64; PSSU's Answer ¶ 64. The *fact* is, neither PSSU nor Lehigh County provided the notice or process necessary for Mr. Molina to exercise his rights. *See* Second Molina Decl.

B. Defendants Rely on Supposed Facts Unavailable to Mr. Molina

Defendants also rely on supposed facts that are, by their very nature, unavailable to Mr. Molina. *See* Osborne Decl. Accordingly, this Court should either defer summary judgment pursuant to Federal Rule of Civil Procedure 56(d)(1) or order limited discovery pursuant to Rule 56(d)(2).

[6] PSSU merely argues in its memorandum that the dues deduction authorization in 2006 was all the "process" he was due. PSSU's Memo, at 12. But again, the very validity of this authorization is a disputed issue of material fact.

In opposing a motion for summary judgment, the nonmoving party "'need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Boyle v. Cnty. of Allegheny,* 139 F.3d 386, 393 (3d Cir. 1998) (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993). However, "if a nonmovant . . . cannot present facts essential to justify its opposition" but can provide specific reasons therefor, a court may deny or defer ruling on the motion or it may allow for discovery. Fed. R. Civ. P. 56(d).

As for requests for discovery, "it is well established that a court 'is obliged to give [the nonmovant] an adequate opportunity to obtain discovery.'" *Doe v. Abington Friends Sch.*, 480 F.3d 252, 257 (3d Cir. 2007) (quoting *Dowling v. City of Phila.*, 855 F.2d 136, 139 (3d Cir. 1988)). In fact, "district courts usually grant properly filed requests for discovery under Rule 56(d) '*as a matter of course*,' . . . particularly . . . when there are discovery requests outstanding or where relevant facts are under control of the party moving for summary judgment." *Shelton*, 775 F.3d at 568 (emphasis added).

Here, discovery should be permitted, particularly because "there are discovery requests outstanding" and the "relevant facts are under control of [Defendants]." *Id.* Indeed, Mr. Molina propounded and served written discovery requests prior to Defendants' filing of the summary judgment motions. *See* Osborne Decl., at Ex. A. He sought, *inter alia*, documents detailing precisely the information that could have been used to respond to the statement of material facts filed in this matter. *See id.*

More to the point, many of Defendants' supposed facts—including the existence of internal policies and procedures to which Mr. Molina is not privy—are entirely within their control. *See* PSSU's Facts ¶ 5 (alleging three examples of unenumerated "rights and benefits" to which union members are entitled); ¶ 6 (alleging PSSU's expectations for union shop stewards); ¶ 7 (alleging that PSSU has unidentified "process[es]" and "steps" for addressing membership resignations); Osborne Decl.

Most notably, PSSU alleges it sent a letter to Lehigh County on August 10, 2018, pertaining to Mr. Molina's membership resignation. *Id.* at ¶ 7. However, Mr. Molina never received a copy of such letter prior to filing this case on January 7, 2019, and the letter itself had no impact on the treatment he received from PSSU—which refused to acknowledge his resignation, retained his membership dues, and even sent him a new membership card before his case was filed. Second Molina Decl. ¶¶ 10–18. Yet, because the facts surrounding the letter—its nature, intent, authenticity and the circumstances surrounding its creation and transmission—are entirely within Defendants' control. Mr. Molina needs to discovery to adequately respond to Defendants' allegations. *See* Osborne Decl.

II. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

In any event, Defendants are not entitled to judgment as a matter of law. Accordingly, regardless of whether the parties dispute the facts material to Mr. Molina's claims, Defendants' motions for summary judgment must be denied.

In *Janus*, the United States Supreme Court held that public employees have a First Amendment right not to subsidize union speech and prohibited unions from seeking union payments without an employee's affirmative waiver of rights. 138 S. Ct. at 2486 ("By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.") (citations omitted). Although this ruling applied in the context of union nonmembers, the animating principle behind *Janus* should apply equally to existing union members and future employees as well, *especially* when the union is asking them to sign new agreements purporting to bind them to financially support union speech when old agreements have expired or otherwise become invalid.

The standard for proving a waiver of constitutional rights is well-established, and "the burden of proving the validity of a waiver of constitutional rights is *always* on the government." *Moran v. Burbine*, 475 U.S. 412, 450 (1986) (Stevens, J., dissenting) (emphasis added). "The Supreme Court has long recognized that a party may waive constitutional rights if there is 'clear' and 'compelling' evidence of waiver and that waiver is voluntary, knowing, and intelligent." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 205 (3d Cir. 2012) (footnotes omitted). "[C]ourts must 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Additionally, in recognition of the First Amendment rights of public

employees, public-sector unions and the government are required to provide due process under the law enabling them to exercise those rights. These principles are not new to labor law. For instance, in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court considered a due process challenge to a public-sector union's practice of internally deciding—and obstructing—challenges to the amount charged to nonmembers. The Court ultimately struck down the union's practice as deficient, stating that "the original procedure [adopted by the union] was . . . defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307. The Court reasoned that, "[s]ince the agency shop itself is 'a significant impingement on First Amendment rights,' the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20.

Here, Defendants maintain that they have no obligation to seek and obtain a waiver of a public employee's rights prior to deducting union payments, that they need not provide notice of such rights, and that there is no requirement to provide procedures facilitating the exercise of such rights. But they have not demonstrated entitlement to such a ruling. For one, Defendants deducted union dues from Mr. Molina with nothing more than a membership card and dues deduction authorization they told members was "invalid," at least as far back as January 2018. And they have not alleged that they sought any other form of authorization from Mr. Molina at any time.

Likewise, neither PSSU nor Lehigh County has alleged that Mr. Molina waived his First Amendment rights in any way, despite their burden to show such waiver. *See Moran*, 475 U.S. at 450. Even his since-invalidated membership card from 2006 contains nothing by way of substantive terms.

Finally, Defendants have utterly failed to establish that whatever policy or process they have in place meets constitutional requirements. The only process Defendants have alleged is the unidentified "process[ ]" and "steps" referenced in PSSU's Statement of Material Facts, but they have provided nothing by way of description or documentation to describe this supposed process.[7]

CONCLUSION

Because Defendants cannot bear their burden to show an absence of disputed issues of material fact and have failed to show that the law entitles them to judgment, this Court should deny their summary judgment motions. Alternatively, this Court

[7] Defendants argue that state action is not present. However, the Supreme Court has recently and repeatedly ruled on Section 1983 claims, which necessarily require state action, stemming from constitutional violations due to public-sector union wage deductions, as has the Third Circuit. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018); *Otto v. PSEA*, 330 F.3d 125 (3d Cir. 2003). Decisions in this district have specifically noted the "clearly established pattern, if not precedent, in favor of hearing § 1983 claims against public-sector unions" where, as here, public-sector unions rely on the government to enforce a collective bargaining agreement. *Williams v. Pennsylvania State Educ. Ass'n*, No. 1:16-cv-02529-JEJ, 2017 WL 1476192, at *4 (M.D. Pa. Apr. 25, 2017) (citation omitted) (attached hereto); *accord Misja v. Pennsylvania State Educ. Ass'n*, No. 1:15-cv-1199, slip op. at 15 (M.D. Pa. Mar. 28, 2016), ECF No. 28 (same) (attached hereto).

should either defer summary judgment pursuant to Rule 56(d)(1) or grant to Mr. Molina the opportunity to conduct limited discovery pursuant to Rule 56(d)(2).

Dated: October 18, 2019

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, the undersigned, certify that the foregoing brief complies with the word count limit of Local Rule 7.8(b)(2). This brief contains 4,014 words, as calculated by the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 18, 2019, I electronically filed the foregoing, and the accompanying attachments and declarations, with the Clerk of Court using the Court's CM/ECF system, which will send electronic notification of the filing to all counsel of record in this matter, who are ECF participants, and that constitutes service thereon pursuant to Local Rule 5.7.

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