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

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

PLAINTIFF'S BRIEF IN OPPOSITION TO UNION DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT

Nathan J. McGrath
Pa. Attorney I.D. No. 308845
E-mail: njmcgrath@fairnesscenter.org
David R. Osborne
Pa. Attorney I.D. No. 318024
E-mail: drosborne@fairnesscenter.org
Danielle R.A. Susanj
Pa. Attorney I.D. No. 316208
E-mail: drasusanj@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Floor 2
Harrisburg, Pennsylvania 17101
Phone: 844.293.1001
Facsimile: 717.307.3424

Attorneys for Plaintiff

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INTRODUCTION

Union Defendants' amended summary judgment motion asks this Court to decide a case Union Defendants wish they were litigating, not the one they are. Union Defendants wish the *facts* were different: that an unconstitutional provision entitled "maintenance of membership" was not in their collective bargaining agreement and that Plaintiff John Kabler has somehow waived his right to resign his union membership. And they wish the *law* were different: that state action could not be established, that Mr. Kabler lacked standing, or that this action were moot, among other creative theories. But summary judgment requires undisputed facts and a legal entitlement to judgment, not just wishful thinking. Therefore, Union Defendants' request for summary judgment must be denied.

Alternatively, Mr. Kabler should have the opportunity to conduct discovery as to the facts alleged by Union Defendants. Although Mr. Kabler's previous request for such discovery was denied, Union Defendants filed an amended motion for summary judgment after this Court converted their motions to dismiss, and their amended motion introduced new, disputed issues of fact. Accordingly, if this Court does not immediately deny Union Defendants' amended motion for summary judgment, this Court should allow discovery to proceed on Counts One, Three, and Four—and, should this Court rule against Mr. Kabler's cross motion for summary judgment, Count Two—of the Complaint.

COUNTER STATEMENT OF THE CASE

I. COUNTER STATEMENT OF FACTS

Since on or about April 10, 2017, Mr. Kabler has been a Commonwealth of Pennsylvania employee working as a liquor store clerk for the Pennsylvania Liquor Control Board ("PLCB"). Compl. ¶ 27, ECF No. 1; *see also* Defs.' Joint Statement of Material Facts Not In Dispute ¶¶ 1, 21, ECF No. 36 ("Defs.' Joint Statement"). Defendants United Food and Commercial Workers Union, Local 1776 Keystone State ("Local 1776") and United Food and Commercial Workers Union, Pennsylvania Wine and Spirits Council ("UFCW Council") are employee organizations representing PLCB employees under Pennsylvania's Public Employe Relations Act ("PERA"), Defs.' Joint Statement ¶¶ 4, 11, 14, and the Commonwealth has recognized them as the exclusive representative for Mr. Kabler's bargaining unit for purposes of collective bargaining, Compl. Ex. A, art. 2, at 3, 4, ECF No. 1-1. As a public employer, the PLCB is also subject to PERA. Defs.' Joint Statement ¶ 3.

PERA authorizes employee organizations and public employers to enter into collective bargaining agreements that provide for "maintenance of membership," a provision agreed upon by the public employer and the employee organization which forces union members to maintain their union memberships and limits members' ability to resign to a 15-day window period immediately preceding the expiration of a collective bargaining agreement. 43 P.S. § 1101.301. Likewise, PERA authorizes employee organizations and public employers to agree to a provision for

"membership dues deduction," which requires the public employer to collect and remit dues to the union following authorization by employees. 43 P.S. § 1101.705; *see also* Defs.' Joint Statement ¶¶ 15–16.

Pursuant to PERA, the Commonwealth and Local 1776, through the UFCW Council, entered into a collective bargaining agreement ("CBA"), the terms of which extended from July 1, 2016, through June 30, 2019. Defs.' Joint Statement ¶¶ 11–16; Compl. Ex. A. Article 4 of the CBA contains a maintenance of membership provision, whereby employees subject to the terms of the CBA could not resign their union membership except for a 15-day window period immediately preceding the expiration of the CBA. Defs.' Joint Statement ¶¶ 17–20; Compl. Ex. A at 5. Article 4 of the CBA also contains a dues deduction provision, whereby the Commonwealth of Pennsylvania deducts union dues from employees' wages in order to transmit them to Local 1776 and/or the UFCW Council. *Id.*

When Mr. Kabler began his employment with the Commonwealth, the PLCB required him to attend two days of mandatory employee orientation, during which Defendant Rhodes gave a presentation. Second Declaration of Plaintiff John R. Kabler, Jr. ¶¶ 3–4 ("Second Kabler Decl."). Defendant Rhodes's presentation indicated that membership in Local 1776 was required as a condition of employment. *See id.* ¶ 4. After her presentation, Mr. Kabler then brought his unsigned union membership form back to her and told her that he was unhappy that he had to be a union member and did not want to be a member. *Id.* ¶ 5. Defendant Rhodes told Mr.

Kabler that he could either be a union member or not have a job. *Id.* ¶ 5. Mr. Kabler was never told that he had the option not to be a union member and still keep his job. *Id.* ¶ 5. Defendant Rhodes also gave Mr. Kabler instructions on filling out parts of the form, including the PAC authorization. *Id.* ¶ 5. She never told Mr. Kabler to review the back of the form—which was a triplicate form—and, if there was anything printed on the back, Mr. Kabler had no reason to see or be aware of it. *Id.* ¶ 7. He ultimately signed the membership agreement only because he believed it was required as a condition of his employment with the PLCB. *Id.* ¶ 8. After his employment started, Mr. Kabler received a "Welcome Letter" from Local 1776 that confirmed Defendant Rhodes's statements and his belief based on those statements that membership in Local 1776 was required as a condition of employment. *Id.* ¶ 10–11; Compl. Ex. B.

The Commonwealth withheld union dues for Union Defendants from Mr. Kabler's wages for the next two years. Declaration of Plaintiff John R. Kabler, Jr., in Support of Plaintiff's Cross Motion for Partial Summary Judgment ¶ 11 ("First Kabler Decl."), ECF No. 39-2. After the first year, Mr. Kabler learned that he had the right not to be a member of Local 1776 and, in July 2018, sent a letter to Local 1776 with a copy to the Commonwealth of Pennsylvania resigning his Local 1776 union membership. Compl. Ex. C; *see also* Defs.' Joint Statement ¶¶ 47–48. In response, the Commonwealth rejected Mr. Kabler's attempt to end his union membership and dues deductions, pointing Mr. Kabler specifically to the maintenance of membership article

in the CBA and informing Mr. Kabler that due to the CBA language, he could not end his membership or dues deductions without an "exception" from Local 1776. *See* First Kabler Decl. ¶¶ 7–8; Compl. Ex. D.

Union Defendants did not honor Mr. Kabler's resignation at any time prior to the filing of this case. Instead, Local 1776 official, Andrew Gold, left Mr. Kabler two voicemail messages on July 19, 2018 and August 2, 2018, stating only that he wished to speak with Mr. Kabler about what he called his "request to resign" and "opt out" and wanted to "give [him] some information." First Kabler Decl. ¶¶ 7–9; Second Kabler Decl. ¶¶ 13-15. Mr. Gold did *not* have a phone conversation with Mr. Kabler on August 10, 2018. Second Kabler Decl. ¶¶ 16–17.

Nearly nine months later, after Mr. Kabler had filed this case, Local 1776 decided to acknowledge Mr. Kabler's resignation, but not from the date he resigned. First Kabler Decl. ¶ 10; Gold Second Decl. Ex. D, ECF No. 35-1. Instead, Local 1776 considered his resignation effective April 10, 2019. *Id.* Local 1776 chose to retain the dues deducted from Mr. Kabler's wages from the date of his resignation letter. First Kabler Decl. ¶ 12.

II. COUNTER STATEMENT OF PROCEDURAL HISTORY

Mr. Kabler filed this action on March 6, 2019, against Union Defendants, as well as PLCB, Thomas W. Wolf, in his official capacity as the governor of the Commonwealth of Pennsylvania, Timothy Holden, in his official capacity as Chairman of the PLCB, Michael Newsome, in his official capacity as Secretary of the

Pennsylvania Office of Administration, and Anna Maria Kiehl, in her official capacities as Chief Accounting Officer and Deputy Secretary for the Office of Comptroller Operations (collectively, "Commonwealth Defendants"). Compl. ¶¶ 11–20, ECF No. 1.

After the complaint was filed, Union Defendants moved to dismiss only in part, ECF No. 15, and filed a brief in support thereof, ECF No. 21. Commonwealth Defendants also filed a motion to dismiss, ECF No. 16, an amended motion, ECF No. 17, and a brief in support thereof, ECF No. 20.

On May 22, 2019, this Court ordered all parties to show cause "as to why Defendants' motions to dismiss . . . should not be converted . . . into motions for summary judgment." Order, ECF No. 22. All parties timely filed responses to this Court's show cause order. ECF Nos. 26, 27, 28.

This Court converted Union and Commonwealth Defendants' respective motions to dismiss, ECF Nos. 15, 17, into motions for summary judgment and denied Mr. Kabler's request for discovery following conversion of the motions. Order, ECF No. 31. This Court also ordered Union and Commonwealth Defendants to file briefs and statements of material facts in support of their converted motions for summary judgment and ordered Mr. Kabler to file his motion for summary judgment, a brief in support thereof, and a statement of facts. *Id.*

Instead, Union Defendants filed an amended motion for summary judgment, seeking to dismiss the complaint in its entirety, thus adding multiple claims to their

amended motion that were not present in their converted motion to dismiss. *Compare* Union Defs.' Mot. to Dismiss Pl.'s Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 2, ECF No. 15 (seeking dismissal only of claims against individual Union Defendants, "all declaratory and equitable claims for relief, and the fraudulent misrepresentation claim"), *with* Union Defs.' Am. Mot. for Summ. J. Pursuant to Fed. R. Civ. P. 56, at 3, ECF No. 35 (seeking dismissal of "all claims"). Union Defendants also filed three additional declarations, ECF Nos. 35-1–3, and a brief, Union Defendants' Brief in Support of their Amended Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56, ECF No. 38 ("Union Defs.' Br.").

Meanwhile, Commonwealth Defendants filed a memorandum of law and supplemental authority. *See* Comm. Defs.' Mem. of Law in Supp. of Converted Mot. for Summ. J. and Supp'l Auth. in Supp. Thereof, ECF No. 37 ("Comm. Defs.' Mem. of Law"). Union and Commonwealth Defendants also filed a Joint Statement of Material Facts Not In Dispute, ECF No. 36. On the same day, pursuant to this Court's order, Mr. Kabler filed his cross motion for partial summary judgment requesting judgment in his favor as to Count Two of his complaint, a brief with declaration in support, and a statement of facts. *See* ECF Nos. 39–41.

On August 23, Commonwealth Defendants filed a letter correcting an error in their Memorandum of Law and made clear that, contrary to their previous representations, Mr. Kabler had never received a refund of dues deducted from his

wages after his resignation letter was received. Letter from Caleb C. Enerson, DAG, ECF No. 48.

COUNTER STATEMENT OF QUESTIONS INVOLVED

1. Whether Union Defendants established entitlement to judgment as a matter of law where they assert a lack of state action even though Union and Commonwealth Defendants acted directly and in concert with one another to deprive Mr. Kabler of his constitutional rights.

2. Whether Union Defendants' reliance on an "anniversary" revocation date due to their allegation of a phone call that never happened and an "interpretation" of the membership agreement that contains no such provision insulates them in any way.

3. Whether the individual Defendants should be dismissed where there are sufficient allegations against them in the Complaint and where they are not duplicative because the entity sued asserts immunity.

4. Whether Union Defendants have carried their heavy burden to demonstrate that all prospective relief is moot.

5. Whether Plaintiff's state law claim should be dismissed.

6. Whether Defendants should be permitted to manipulate this Court's conversion order to prematurely move for summary judgment and deny Mr. Kabler any opportunity for discovery, even on counts that order did not address.

ARGUMENT

Union Defendants' amended summary judgment motion relies on disputed, immaterial, or demonstrably false facts, and they are not entitled to judgment as a matter of law. Accordingly, their motion for summary judgment must be denied.

Alternatively, Union Defendants' motion underscores the need for an opportunity for discovery before judgment in their favor could even be considered. They have attempted here to manipulate this Court's conversion order by amending their motion for summary judgment to include claims that were not converted, thereby trying to shirk discovery on additional claims on which this Court did not deny discovery. Therefore, even if this Court does not immediately deny Union Defendants' amended motion for summary judgment, Mr. Kabler should have the opportunity to conduct discovery as to those newly asserted facts.

I. LEGAL STANDARD

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The reviewing court is to 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).

"[I]t is well established that a court 'is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery.'" *Doe v. Abington*

Friends Sch., 480 F.3d 252, 257 (3d Cir. 2007) (quoting *Dowling v. City of Philadelphia,* 855 F.2d 136, 139 (3d Cir. 1988)). A grant of summary judgment that is premature or without addressing a Rule 56(d) declaration is an abuse of discretion. *See Shelton*, 775 F.3d at 568; *Abington Friends Sch.*, 480 F.3d at 256.

II. THIS COURT SHOULD DENY UNION DEFENDANTS' MOTION BECAUSE THEY RELY ON DISPUTED OR DEMONSTRABLY FALSE STATEMENTS OF FACT

Union Defendants' motion must fail because it makes material to judgment in its favor the establishment of facts that Mr. Kabler disputes, can already demonstrate to be false, or must have the opportunity to conduct discovery on before they could be resolved against him.

For instance, Mr. Kabler has already demonstrated that there was no phone call between him and a union official on August 10, 2018. *See* Second Kabler Decl. ¶¶ 13–20 & Ex. A. Nor was Mr. Kabler told in August 2018 that Local 1776 would enforce or was relying upon an interpretation of a membership agreement as allowing a yearly occurring revocation window. *See id.* The membership agreement Defendants offer as the agreement Mr. Kabler signed does not support the interpretation Defendants' offer regarding a yearly occurring revocation window. *See* Counter Statement ¶¶ 33–34. And these are all inaccuracies Mr. Kabler has been able to demonstrate without the benefit of any discovery.

Additionally, Mr. Kabler has had no opportunity to conduct discovery on many of the facts that Union Defendants make essential to their motion. "[B]y its very

nature, the summary judgment process presupposes the existence of an adequate record." *Abington Friends Sch.*, 480 F.3d at 257. Because there is not an adequate record here following an opportunity for discovery, the motion must be denied. Mr. Kabler does not simply admit without benefit of discovery the substantial fact allegations Defendants have raised in their motions. This includes the nature of the Commonwealth's involvement and/or knowledge of the events at issue in this case, *see* Defs.' Joint Statement ¶¶ 26–28; Local 1776's handling of resignations and interpretation of its membership card; the true appearance and/or content of the membership agreement Mr. Kabler was forced to sign, *see* Second Kabler Decl. ¶ 6; and the timing of correspondence sent to Mr. Kabler, Second Kabler Decl. ¶ 11, among others. *See* Decl. of Nathan J. McGrath, Esq. ("McGrath Decl."), attached hereto.

In sum, although Mr. Kabler disagrees that many of these facts are material to the proper application of state action law, as discussed below, they are essential to the grounds underlying Defendants' motion, and thus could not be resolved against Mr. Kabler until he had the opportunity to conduct discovery into them. *See infra* Section IV.

III. THIS COURT SHOULD DENY UNION DEFENDANTS' MOTION BECAUSE THEY ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. Mr. Kabler Has Demonstrated State Action

Contrary to Union Defendants' contentions, Mr. Kabler has established state action as to both Union and Commonwealth Defendants under the Third Circuit's case law. This Court should therefore deny Union Defendants' amended motion for summary judgment.

Union Defendants argue that state action is not present even though Union and Commonwealth Defendants have directly and together agreed to restrict Mr. Kabler's constitutional rights. *See* Union Defs.' Br., Section B. 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); *Harris v. Quinn*, 573 U.S. 616, 625–26 (2014); *Otto v. PSEA*, 330 F.3d 125 (3d Cir. 2003); *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). The Supreme Court in *Janus* also recognized the state action implicit whenever the government deducts union payments from public employees by requiring a waiver of First Amendment rights before such dues can be deducted—a nonsensical requirement were there no state action. *See Janus*, 138 S. Ct. at 2486. Here, too, the record establishes that the Commonwealth itself has been an actor in the

constitutional violations alleged and that the Union Defendants are state actors due to their joint action with the Commonwealth.

1. Commonwealth Defendants took direct actions giving rise to Mr. Kabler's constitutional injuries.

Union Defendants challenge the "lack of state action on the part of the Commonwealth" as related to the actions taken by the Union Defendants. *See* Union Defs.' Br. 15, 19, 20. Critically, Union Defendants ignore the most obvious form of state action present here: literal and direct action by the Commonwealth itself. The constitutional injury alleged here was caused, at least in equal part, by Commonwealth Defendants.

Commonwealth Defendants agreed to and enforced a maintenance of membership provision in Mr. Kabler's CBA pursuant to state law. And when Mr. Kabler sent a union resignation letter to Union and Commonwealth Defendants, Commonwealth Defendants responded and rejected his attempt to end his membership with Local 1776. First Kabler Decl. ¶¶ 7–8; Compl. Ex. D. These undisputed facts constitute state action relevant to Count Two, which alleges that Union and Commonwealth Defendants together forced Mr. Kabler into continued support of and association with an organization he had never wanted to be a part of or support, even after his resignation.

Moreover, Commonwealth Defendants, acting pursuant to the CBA and state law, continued to withhold money from Mr. Kabler's wages and give that money to

Union Defendants. *See* 43 P.S. § 1101.301(11) (defining "Membership dues deduction[s]" as a "practice of a public employer"). Likewise, Commonwealth Defendants, acting pursuant to state law, recognized Local 1776 and UFCW Council as the exclusive representative for Mr. Kabler's bargaining unit and required Mr. Kabler to attend the mandatory employee orientation at which he learned that union membership was required. Second Kabler Decl. ¶¶ 3–5. And it was the Commonwealth, as a public employer, who was responsible for dues deductions under the authorization Mr. Kabler was asked to sign. *See* Defs.' Joint Statement ¶ 33 (giving authorization to "my Employer" and requiring notification "to the company and the union" to terminate). Such undisputed facts constitute state action relevant to the constitutional violations outlined in Counts One, Two, and Three. *See Mitchell v. L.A. Unified Sch. Dist.*, 739 F. Supp. 511, 516 (C.D. Cal. 1990) (holding public employer a proper defendant for Section 1983 along with union, where "it is the public employer's involvement in the agreement authorizing the seizure of the agency fees that gives rise to a claim by plaintiffs for deprivation of federally secured constitutional rights. And the public employer is the one that deducts the fee from its employees' paychecks.").

2. Union Defendants acted under color of state law, with the help of and in concert with state officials.

Mr. Kabler's state action allegations also establish that Union Defendants can be sued as state actors themselves under Third Circuit case law governing state action.

Union Defendants' challenge, limited as it is to only a "lack of state action on the part of the Commonwealth," ignores these undisputed facts and misconstrues the state action theory at issue here.

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

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

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

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

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

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

The Third Circuit has explained that "courts must ask *first* whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and *second,* whether the private party charged with the deprivation *could* be described in all fairness as a state actor." *Mark*, 51 F.3d at 1143 (quotation omitted). As to the second prong, one factor, among others, that is relevant to "determining whether a particular action or course of conduct is governmental in character," is "the extent to which the actor relies on governmental assistance and benefits." *Id.* (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478 (1988)). "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Prof'l Collection Servs., Inc.*, 485 U.S. at 486.

Here, like the public-sector union in *Williams*, Union Defendants are state actors having "acted with the help of or in concert with state officials," and the facts leading to that conclusion are undisputed by Union and Commonwealth Defendants.

State law makes "membership dues deduction" and "maintenance of membership" "proper subjects of collective bargaining." 43 P.S. § 1101.705. Under state law, therefore, Union Defendants bargained for and received the entitlement to deduction of dues by Commonwealth Defendants here. *See* Defs.' Joint Statement ¶¶ 19–20. Indeed, as the Commonwealth Defendants acknowledge, Mr. Kabler's resignation from the union and request to end dues deductions "contradict[ed] the plain language of the controlling CBA." Br. of Comm. Defs. In Support of Am. Mot. to Dismiss Pl.'s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) 6, ECF No. 20 ("Comm. Defs.' Br."). Thus, Commonwealth Defendants made clear that they would enforce the agreement on behalf of Union Defendants, informing Mr. Kabler that his deductions would not cease "unless" Union Defendants "ma[de] an exception." First Kabler Decl. ¶¶ 7–8; Compl. Ex. D.

Additionally, membership dues deduction and enforcement of maintenance of membership by Commonwealth Defendants is a significant benefit to Union Defendants, fitting the Third Circuit's second test for state action. *Accord Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (recognizing that unions "face substantial difficulties in collecting funds for political speech without using payroll deductions" (quotation omitted)); *see Janus*, 138 S. Ct. at 2467 (referring to payroll deduction as a "special privilege[ ]"; *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 645 (7th Cir. 2013) (recognizing that state deduction of union dues for public

sector unions means that the government is assisting in funding the expression of ideas).

Union Defendants wholly ignore the import of these facts that they do not, and cannot, dispute, by arguing that the only way there can be state action in this case is if the Commonwealth Defendants "significantly encouraged" every discrete action alleged in the complaint. This argument fails both because it fundamentally misunderstands the allegations in Mr. Kabler's complaint and because it is a misapplication of the law in any event. The Third Circuit's second state action test does not require a finding that the government "significantly encouraged" an otherwise private actor. Instead, the "significantly encourage" language is relevant only to the Third Circuit's *third* test for state action. *See Kach*, 589 F.3d at 648 (under the third test, "[t]he State will be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State" (internal quotations and emphasis omitted)).

But even if the Third Circuit's third test were applied here, Defendants misconstrue the standard, and their cited cases do not establish their entitlement to judgment as a matter of law on state action. In *Talley v. Feldman*, for example, the Eastern District did not require litigants seeking to prove state action to demonstrate that the alleged state actor was involved in *every* discrete action alleged in the complaint, as Union Defendants appear to argue; instead, *Talley* stated that the test is

satisfied where the "government significantly encouraged the labor union to engage *in the constitutional violations*," 941 F. Supp. 501, 512 (E.D. Pa. 1996) (emphasis added), which Commonwealth Defendants arguably did here by agreeing with Union Defendants to a CBA containing an unconstitutional maintenance of membership requirement. Further, *Talley* involved a situation where the plaintiff *admitted* that the defendant was "not a state actor." *Id.* This Court's decision in *Slater v. Susquehanna County*, 613 F. Supp. 2d 653, 658, 660 (M.D. Pa. 2009), is similarly inapposite, as there, this Court dismissed the claims against the labor union defendants because the plaintiff had made no attempt to even allege state action against the labor union defendants.

3. The Union Defendants' reliance on an interpretation of a membership agreement that has no basis in its text cannot unwind the state action that had already occurred.

In an apparent attempt to avoid a finding of state action, Union Defendants present Mr. Kabler's purported membership agreement as a "private" contract superseding the CBA. Union Defs.' Br. 18. But Union Defendants cannot wash away state action, especially when their efforts entail inaccurate portrayals of the facts. More to the point, the alleged existence of the purported membership agreement turns out to be immaterial as a matter of fact and irrelevant as a matter of law, for at least four reasons.

First, the membership agreement's dues deduction authorization only *confirms* the state action here—the state as employer is an essential component of it. Defs.'

Joint Statement ¶ 33 (giving authorization to "my Employer" and requiring notification "to the company and the union" to terminate); *see, e.g.*, *Williams*, 2017 WL 1476192, at *4; *see also N.L.R.B. v. Atlanta Printing Specialties & Paper Prod. Union 527*, 523 F.2d 783, 785 (5th Cir. 1975) ("The dues authorization is a contract between the employee and the employer, authorizing the employer to withhold dues from the employee's wages, but reserving to the employee the power of revocation at specified periods.").

Second, the maintenance of membership provision in Mr. Kabler's CBA—not the purported membership agreement—was obviously enforced against him. It is undisputed that Mr. Kabler sent a letter resigning his union membership to the Union and the Commonwealth. Within about a week, the Commonwealth replied in writing, rejecting his "request" explicitly because of the maintenance of membership language in the CBA, unless the Union made an "exception." Compl. Ex. D; First Kabler Decl. ¶¶ 7–8. The Union never responded in writing. First Kabler Decl. ¶ 9. Instead, Mr. Kabler received two voicemails from Mr. Gold, offering only to give him "information." Second Kabler Decl. ¶¶ 13–15. Contrary to Union and Commonwealth Defendants' statement of fact, Mr. Kabler *never spoke with Mr. Gold on August 10, 2018, regarding his resignation*, nor did they ever speak about his resignation until the phone call on March 5, 2019. Second Kabler Decl. ¶¶ 16–20. While Union Defendants ultimately decided to cease deducting dues in April 2019 and thus mitigate the damages owed to Mr. Kabler after this suit was filed, they refused to refund the

dues deducted from Mr. Kabler's wages after he sent his resignation letter and cannot undo the fact that maintenance of membership was enforced against Mr. Kabler during that time, impinging his First Amendment rights.

Third, and relatedly, the membership agreement Union Defendants say Mr. Kabler signed would not have legal effect until after the CBA expired. Union Defendants cannot change the language of the agreement, which states that dues deduction authorization "is to become effective immediately, and ***after the present contract expiration date*** shall remain irrevocable for a period of one (1) year therefrom or to the expiration of said contact, [sic] whichever occurs sooner." Defs.' Joint Statement ¶ 33 (emphasis added).

Whatever else this tortured language may mean, the "present contract expiration date" is thus the earliest triggering date upon which revocation can be effective under the terms of this agreement, and that occurred when the CBA expired in June 2019, long after Mr. Kabler's resignation. Nowhere in this language is a "provi[sion to] every member [of] at least one revocation window per year," as Union Defendants now claim. *Cf.* Defs.' Joint Statement ¶ 34. Rather, that is just the "interpretation" Union Defendants, as they carefully word it, choose to give to the contract, despite the fact that their "interpretation" is counter to the plain language. Had Union Defendants wished to include such language, they would have—their current membership agreement, which does provide such a window, proves they know how. *See* Decl. of David R. Osborne, Esq. & Ex. A (current Local 1776

membership agreement, which is publicly available, provides that authorization is irrevocable unless notice is given during the 15 days "before the annual anniversary date of this authorization" or the expiration of the CBA, "whichever occurs sooner").[1]

Finally, even if Union Defendant's membership agreement did control—and it clearly did not—Union Defendants secured Mr. Kabler's signature, if at all, only by providing him with false information concerning his rights to sign or not to sign. The

[1] After this case was filed, Union Defendants finally "confirmed" Mr. Kabler's resignation, which they now claim was in accordance with their interpretation of the membership agreement because Mr. Kabler's *complaint* met the requirements for revocation. However, not only are Union Defendants ignoring the plain language of the membership agreement, as explained above, they also ignore their and Commonwealth Defendants' technical requirements regarding resignation. The CBA required "written notice by certified mail, (return receipt requested) to the Employer and the Union." Defs.' Joint Statement ¶ 13. Similarly, the purported membership agreement requires "written notice to the company and the union by certified mail" "at least thirty (30) days and not more than forty-five (45) days before any periodic renewal date of this authority." Defs.' Joint Statement ¶ 33. Mr. Kabler's federal Section 1983 Complaint was not sent via certified mail, return receipt requested, to the employer and the union, nor was it within the fifteen days before the CBA expired or the 30 to 45 day window before "any periodic renewal date of this authority," which, as discussed above, occurs only "after the present contract expiration date." *See* Defs.' Joint Statement ¶ 33. Nor, for that matter, is the Complaint a resignation of union membership in the first place. Indeed, the Commonwealth Defendants expressly state that Mr. Kabler's resignation "contradict[ed] the plain language of the controlling CBA," Comm. Defs.' Br. 6, and, as the membership agreement had similar requirements, the same would be true for it as well. Local 1776 now tries to change the past by claiming Mr. Kabler's Complaint somehow "met the requirements of revocation," Defs.' Joint Statement ¶ 60, asserting that it "simply needed to be both in writing and made timely." Decl. of Wendell W. Young, IV, Ex. B, ECF No. 35-2. But the language is what it is, and Mr. Kabler's federal Section 1983 complaint did not meet it under any reasonable interpretation.

very validity of the document on which Union Defendants rely hinges on disputed facts.

In sum, Union Defendants made an exception to avoid being caught violating Mr. Kabler's rights, allowing Mr. Kabler out of union membership despite the language of the CBA only after this case was filed. The membership agreement, by its very terms, simply had nothing to do with it. The unintelligible membership agreement offered by Union Defendants does not entitle them to judgment as a matter of law on Mr. Kabler's constitutional claims.

B. Union Defendants Misstate Mr. Kabler's Claims for Relief in Challenging the Refund of Wages Wrongfully Withheld

Union Defendants attack a straw man in their challenge to the refund of dues, claiming that this is a so-called "clawback" case. *See* Union Defs.' Br., Section D. It is not. The compensatory damages Union Defendants owe to Mr. Kabler under Counts One through Three are (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. Union Defendants' good faith defense is, therefore, irrelevant, as Mr. Kabler does not seek to recoup any agency fees he would have paid prior to the *Janus* decision.

Union Defendants again turn to the membership agreement to protect them from the damages they owe to Mr. Kabler, but it cannot bear such weight, for the same reasons discussed previously. *See supra* Section II.A.3. And, in any event, the membership agreement is unenforceable as a contract for many reasons, all of which require the resolution of disputed facts. Just the first is that Mr. Kabler only signed the agreement involuntarily after being told it was a condition of his employment, Second Kabler Decl. ¶¶ 2–10, a fact Defendants have yet to offer any evidence to even dispute. *See Atlanta Printing Specialties & Paper Prod. Union 527*, 523 F.2d at 785 ("Because the power of revocation is a subsidiary provision of the dues authorization contract, a fortiori, it must be interpreted in light of circumstances surrounding the time the authorization contract was made."). Nor does the agreement meet the requirements for constitutional waiver, which are that a waiver "must be freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486; *see also Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988) (waiver of constitutional rights must be "voluntary, knowing, and intelligent"). Given both the circumstances surrounding the signing of the purported membership agreement and its impenetrable language, it cannot possibly meet the requirements for a waiver of constitutional rights.

Again, the purported existence of a membership agreement is not only immaterial as a matter of fact, but irrelevant as a matter of law. And because the membership agreement would also be unenforceable, it cannot remove the

constitutional violations from this case, nor does it absolve Defendants of their responsibility for them.

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

Union Defendants next argue that the individual union officers named as defendants, Wendell W. Young, IV, Peg Rhodes, and Michele L. Kessler, should be dismissed as parties to Mr. Kabler's civil rights claims.[2] However, contrary to Union Defendants' contentions, these union officers remain proper parties both because they are state actors under the joint action test, as alleged in the complaint, and because where, as here, the entity sued has asserted immunity, they are not redundant in their official capacities. *See* Union Defs.' Br., Section C.

Union Defendants misunderstand the law governing when private individuals may be sued under Section 1983 for having acted under color of law. Here, all allegations, including those relevant to state action, are made against both the Union and the individual Union Defendants, *see* Compl. ¶¶ 12–14, 21, 34–78, and, for reasons discussed above, the undisputed record establishes state action under Third Circuit law. Additionally, there are specific allegations relating to the individual Union Defendants. *See, e.g.*, Compl. ¶¶ 31 & Ex. B, 61–67, 68–78. "Dismissal is not required" even where duplicative individual defendants are named, *Doe v. Se. Delco Sch. Dist.*, 140

[2] Union Defendants do not appear to argue that these union officers should be dismissed in their official or individual capacities as it relates to Count Four.

F. Supp. 3d 396, 401 (E.D. Pa. 2015), and, to the extent the Union asserts immunity in the form of the good faith defense, individuals named in their official capacity are not duplicative, despite Union Defendants' claim, if the entity cannot be sued. *See Damiano v. Scranton Sch. Dist.*, 135 F. Supp. 3d 255, 268–69 (M.D. Pa. 2015) (suits against individuals in their official capacity may be dismissed as duplicative of claims against the entity because the entity can be sued).[3]

Finally, if the Union intends to suggest that the individual defendants were acting solely as individuals, and not as agents or officials of the Union, as to any of the facts alleged in the Complaint, then the need for discovery emerges on this point, as well.

D. Defendants Have Not Carried Their "Heavy" Burden To Demonstrate that the Requested Prospective Relief Is Moot

Defendants have not offered sufficient evidence or explanation to establish, under their heavy burden, that the prospective relief Mr. Kabler seeks is moot. *See* Union Defs.' Br., Section E. Accordingly, this Court should deny their amended motion for summary judgment to the extent it seeks dismissal based on mootness.

Defendants have the burden to demonstrate mootness, and that burden, according to the Supreme Court, "is a heavy one." *L.A. Cty. v. Davis*, 440 U.S. 625,

[3] Plaintiff disagrees that Local 1776 as an entity could assert the good faith defense in any event, derived as it is from qualified immunity, a personal defense. *See Doe v. Se. Delco Sch. Dist.*, 140 F. Supp. 3d at 403; *see also Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985).

631 (1979). Indeed, the Third Circuit has described the burden for the party alleging mootness as "'heavy,' even 'formidable.'" *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (quoting *United States v. Gov't of Virgin Islands,* 363 F.3d 276, 285 (3d Cir. 2004)). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted). In *DeJohn*, the Third Circuit concluded that a policy change made only while litigation was ongoing and continued defense of the constitutionality of the policy are "two factors significant" that weigh in favor of establishing a "reasonable expectation" that the allegedly unconstitutional conduct will recur. *See* 537 F.3d at 309.

Here, Union Defendants' mootness assertion hinges on their own supposed "voluntary cessation," yet they only ended the seizure of Mr. Kabler's wages after this case was filed and continue to defend the constitutionality of the wrongful actions. *See* Comm. Defs.' Br. 16–17. Those two factors mean Union Defendants cannot sustain the "heavy" burden of establishing that there is no reasonable expectation they will return to enforcement of the maintenance of membership provision and violating Mr. Kabler's First Amendment rights. *See DeJohn*, 537 F.3d at 309.

Union Defendants' contention that a new collective bargaining agreement will be stripped of all the challenged unconstitutional provisions does not moot this case.

In fact, Union Defendants simply attach a loose page that appears to be from a draft redline document, rather than a fully executed collective bargaining agreement showing that the draft language is indeed currently in effect. *See* Second Decl. of Andrew Gold, Ex. F, ECF No. 35-1. This does not meet the Defendants' heavy burden to show that this case is moot due to their claim that all challenged provisions have been removed from a new collective bargaining agreement, *see* Defs.' Joint Statement ¶ 65, a claim that Mr. Kabler has had no opportunity to verify. *See* McGrath Decl. And even if Union Defendants remove all challenged provisions, Mr. Kabler's claim for funds unconstitutionally seized from his wages remains.

E. State Law Claims Should Not Be Dismissed

Union Defendants' attack on Mr. Kabler's state law claim does not establish a likelihood to succeed on the merits. On the facts, it only confirms the critical importance of allowing this case to proceed to discovery as to Count Four. On the law, Union Defendants ask this Court to erroneously limit Mr. Kabler's access to courts.

PERA provides exclusive jurisdiction in the Pennsylvania Labor Relations Board for violations of the prohibition of Article IV of PERA by "employe organizations, their agents, or representatives or public employes," not for intentional misrepresentation claims against individuals acting in their personal capacities. 43 P.S. §§ 1101.1201(b), 1101.1301. Thus, Union Defendants' assertion that Count Four is subject to PERA's exclusive jurisdiction bar is possible, if at all, only 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, as alleged in Count One of the Complaint. *See* Union Defs.' Br., Section F. Indeed, while some of Union Defendants' factual statements seem to admit that Ms. Rhodes's coercing Mr. Kabler into union membership at the employee orientation presentation could have been "on behalf of the Local," Union Defendants will not admit that Local 1776 is operating a "closed shop." Defs.' Joint Statement ¶ 24.[4] And Defendants nowhere point to evidence in the record to dispute that Ms. Rhodes told Mr. Kabler that he had to choose between joining the union or not being a PLCB employee.

In other words, even if the constitutional violations Mr. Kabler alleges would fall under PERA's exclusive jurisdiction provision if they were an official Local 1776 practice, that is not the only theory under which Mr. Kabler seeks redress in his complaint. Rather, Mr. Kabler has sued the individual union officials in their personal and official capacities because he does not yet have record evidence to demonstrate whether they were acting as union "representatives" or "agents," or outside their authority in seeking to compel public employees into union membership without the knowledge or blessing of Local 1776 or the Commonwealth. *See* Compl. Count Four.

[4] That some PLCB employees have exercised their right not to be union members is immaterial and irrelevant to whether Mr. Kabler was given the opportunity to exercise that right, especially as Defendants' numbers do not reflect how many, if any, of those who chose nonmembership did so after the employee orientation presentation by Defendant Rhodes. *See* Defs.' Joint Statement ¶ 49.

Contradicting their theory that Mr. Kabler's complaint involves an official practice subject to the exclusive jurisdiction bar, the Union Defendants also seem likely to dispute that there was such a practice. But Defendant Rhodes told Mr. Kabler that he had to sign the membership agreement if he wanted to be a PLCB employee. Second Kabler Decl. ¶ 5. And once that fact is established in this record, Local 1776 may admit that she did so as its agent or may disavow her actions. But Union Defendants cannot be entitled to summary judgment on this theory based on factual allegations that would require them to have it both ways.

Count One and Count Four thus present alternative theories regarding Mr. Kabler's forced union membership. If he was coerced due to an official Local 1776 practice carried about by Local 1776's agents, then he has shown a violation of his constitutional rights under Count One. But in Count Four, Mr. Kabler has alleged that certain individuals were acting in their individual capacities, and PERA does not relegate such claims to the Pennsylvania Labor Relations Board; accordingly, supplemental jurisdiction in this Court is proper, as Counts One, Two, and Three remain proper for the reasons described above.[5]

[5] But if the Court does dismiss the state-law claim, "it should do so without prejudice, as there has been no adjudication on the merits." *Kach*, 589 F.3d at 650.

IV. DEFENDANTS MISUSE THIS COURT'S CONVERSION ORDER TO ATTEMPT TO AVOID THE DISCOVERY REQUIRED BEFORE DEFENDANTS' AMENDED MOTION COULD BE GRANTED

For all the reasons already mentioned, Union Defendants' amended motion for summary judgment should be denied. But in any event, this Court could not grant summary judgment for Defendants without first allowing Mr. Kabler to conduct discovery. Defendants should not be allowed to manipulate this Court into limiting discovery by slipping new grounds into their amended motion that were not in their motion to dismiss and, thus, not covered by this Court's conversion order, denial of discovery, and briefing schedule.

Union Defendants' challenges to Mr. Kabler's damages claims under Counts One through Three, Union Defs.' Br., Sections B & D, are new grounds in their amended motion that were not in their motion to dismiss that was converted by this Court. *See supra*, Counter Statement of Procedural History. Union Defendants are therefore attempting to shoehorn new grounds not comprehended by this Court's conversion order into the briefing schedule for the converted motions, in a blatant and improper attempt to bypass the discovery to which Mr. Kabler is entitled before any claim could be dismissed for failure to establish a disputed fact in the record.[6]

[6] Defendants would also not have misunderstood the relief owed under the Complaint if they had allowed the case to proceed to discovery on the claims they have instead attempted to shoehorn under this Court's conversion order, as the disclosures and demands required under the discovery rules would have involved Mr. Kabler's damages theory.

Then, incredibly, Defendants go on repeatedly to fault Mr. Kabler for having "no evidence" in the record, which they manufactured through their own premature amended motion. *See, e.g.*, Union Defs.' Br. 8 (statement of question involved), 11, 13, 14, 15, 20, 22.

The Union Defendants' repeated reliance on the dearth of record evidence reveals the fundamental problem preventing the success of their motion—the absence of any adequate record whatsoever. "[I]t is well established that a court 'is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery.'" *Abington Friends Sch.*, 480 F.3d at 257 (quoting *Dowling*, 855 F.2d at 139). "This is necessary because, by its very nature, the summary judgment process presupposes the existence of an adequate record." *Id.* (citing Fed. R. Civ. P. 56(c)). Accordingly, "district courts usually grant properly filed requests for discovery under Rule 56(d) as a matter of course," which is "particularly true . . . where relevant facts are under control of the party moving for summary judgment." *Shelton*, 775 F.3d at 568 (internal quotations and citations omitted). "If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion." *Abington Friends Sch.*, 480 F.3d at 257.

Plaintiff's counsel attaches a declaration, *see* McGrath Declaration, under the Third Circuit's requirements for declarations under Federal Rule of Civil Procedure 56(d). *See Abington Friends Sch.*, 480 F.3d at 255 n.3. It lists categories of relevant facts

upon which Mr. Kabler needs discovery to adequately respond to the Defendants' motions. *See* McGrath Decl.

Union Defendants have made clear that their summary judgment theory hinges on their ability to rely on facts that Mr. Kabler has not yet had the opportunity to dispute. *See* McGrath Decl. Those facts are ultimately immaterial, as state action is evident both as to the actions the Commonwealth itself took, and as to the joint action of the Commonwealth and Union Defendants, so the Court should deny the motions under Federal Rule of Civil Procedure 56(d)(1). But if this Court were to find Union Defendants' assertions relevant to summary judgment, it must first allow Mr. Kabler to "marshal facts in aid of [his] argument," *Abington Friends Sch.*, 480 F.3d at 259, especially as the "relevant facts are under control" of the Defendants. *Shelton*, 775 F.3d at 568; *see* Fed. R. Civ. P. 56(d)(2).

Moreover, it would be particularly inappropriate to grant summary judgment here, on the basis of a few declarations by the moving party, where, even without the benefit of any opportunity for discovery, Mr. Kabler has already demonstrated inaccuracies. *See Abington Friends Sch.*, 480 F.3d at 257–59 (reversing grant of summary judgment on basis of affidavit filed by movant, without opportunity for discovery). For instance, a critical factual statement in Defendants' Joint Statement, the assertion of an August 10, 2018 phone call between Andrew Gold and Mr. Kabler, upon which Union Defendants repeatedly rely, *never happened*, as Mr. Kabler demonstrates in his declaration and supports with documentary evidence. *See* Second Kabler Decl. ¶¶ 13–

20 & Ex. A. Indeed, Union and Commonwealth Defendants' motions rely on the false statements of fact in Defendants' Joint Statement and the accompanying declaration that reflect a cavalier approach to the truth only underlining why the motions must be denied and, if allowed to proceed, to proceed only with the benefit of discovery.

CONCLUSION

Because Union Defendants can show neither that there are no undisputed facts material to their motion nor that the law entitles them to judgment on the pleadings, this Court should deny their amended motion, or at the very least defer adjudication until Mr. Kabler has the opportunity for discovery promised him by the Federal Rules of Civil Procedure.

Dated: August 30, 2019

Respectfully Submitted,

THE FAIRNESS CENTER

By: s/ *Nathan J. McGrath, Esq.*

Nathan J. McGrath
Pa. Attorney I.D. No. 308845
E-mail: njmcgrath@fairnesscenter.org
David R. Osborne
Pa. Attorney I.D. No. 318024
E-mail: drosborne@fairnesscenter.org
Danielle R.A. Susanj
Pa. Attorney I.D. No. 316208
E-mail: drasusanj@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Floor 2
Harrisburg, Pennsylvania 17101

Phone: 844.293.1001
Facsimile: 717.307.3424

Attorneys for the Plaintiff

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that the foregoing brief complies with the 40-page limit authorized by this Court. *See* Order ¶ 1, ECF No. 45.

s/ *Nathan J. McGrath, Esq.*
Nathan J. McGrath
Pa. Attorney I.D. No. 308845
E-mail: njmcgrath@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Floor 2
Harrisburg, Pennsylvania 17101
Phone: 844.293.1001
Facsimile: 717.307.3424

Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 30, 2019, I electronically filed the foregoing, and the accompanying attachements 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.

s/ *Nathan J. McGrath, Esq.*
Nathan J. McGrath
Pa. Attorney I.D. No. 308845
E-mail: njmcgrath@fairnesscenter.org
THE FAIRNESS CENTER
500 North Third Street, Floor 2
Harrisburg, Pennsylvania 17101
Phone: 844.293.1001
Facsimile: 717.307.3424

Attorney for the Plaintiff