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

HOLLIE ADAMS, JODY WEABER, KAREN UNGER *and* CHRIS FELKER,	:	
Plaintiffs	:	
	:	**No. 1:19-CV-0336**
v.	:	
	:	**Judge Rambo**
TEAMSTERS UNION LOCAL 429, LEBANON COUNTY, ATTORNEY GENERAL JOSH SHAPIRO, JAMES M. DARBY, ALBERT MEZZAROBA *and* ROBERT H. SHOOP, JR.,	:	**Electronically Filed Document**
	:	*Complaint Filed 02/27/19*
Defendants	:	

MEMORANDUM OF LAW OF COMMONWEALTH DEFEANDANTS IN RESPONSE AND REPLY TO PLAINTIFFS' COMBINED MEMORANDUM FOR SUMMARY JUDGMENT AND RESPONSE

Defendants, Attorney General Josh Shapiro, James M. Darby, Albert Mezzaroba and Robert H. Shoop, Jr. ("Commonwealth Defendants"), file this response and reply to Plaintiffs' Memorandum in Support of Summary Judgment and in Response to Defendants' Motions for Summary Judgment pursuant to this Court's Order of June 3, 2019 (Doc. Nos. 35, 43, 44). For any and all of the reasons set forth in their moving papers and herein, Commonwealth Defendants respectfully request that this Honorable Court grant their Motion for Summary Judgment and grant judgment as a matter of law.

I. INTRODUCTION

Plaintiffs attempt to characterize their decision to join Teamsters Union Local 429 ("Local 429") as an "unconstitutional choice" omits that they had no obligation to join Local 429. The Public Employee Relations Act ("PERA"), the membership form, and the dues authorization at issue all provide in clear language that no employee is compelled to join the Union. Plaintiffs have asserted a vague opposition to membership in Local 429 and to its speech, but have not articulated any particular position that is offensive to them. Carrying the burden of proof on their claims, Plaintiffs have failed to articulate any violation of their rights to free speech and assembly (or to refrain from speech and assembly).

Plaintiffs' proposition that they were subject to an "unconstitutional choice" misstates the facts; they could have chosen *not* to join the Union and elected to pay the fair share fee. Instead, Plaintiffs *chose* to join the Union, rather than pay a fair share fee. That this was a deliberate decision of Plaintiffs is illustrated by Plaintiff Unger. Plaintiff Unger initially *was* a fair share fee payer until she decided to join Local 429 on November 7, 2017, more than two years after beginning employment in October 2015. Plaintiffs elected to join Local 429, and only expressed a desire to leave membership after the Supreme Court's decision in *Janus*.

As a result, Plaintiffs voluntarily joined Local 429 knowing they had a right not to do so, they have been released from their dues authorizations, resigned their

membership in Local 429, and have been refunded all dues from the date of their respective resignations. Thus, Plaintiffs assert no active controversy and Count I is moot. Any action on the part of Commonwealth Defendants would require that Plaintiffs affirmatively rejoin Local 429. Count II, on the other hand, asserts no valid entitlement to relief and ignores well-established precedent.

Commonwealth Defendants request this Court grant summary judgment in their favor on both counts and enter judgment as a matter of law.

II. RESPONSE AND REPLY ARGUMENT

A. Plaintiffs Failed to Address Commonwealth Defendants' Eleventh Amendment Immunity.

Plaintiffs provide no response to the argument that the Commonwealth Defendants are immune from suit pursuant to the Eleventh Amendment, conceding the issue. Thus, Plaintiffs have failed to show that this case is properly before the Court. *See Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 2007). Therefore, it is respectfully submitted that this Court should grant judgment as a matter of law in favor of Commonwealth Defendants.

B. Plaintiffs Voluntarily Joined Local 429.

It is undisputed that Plaintiffs made a choice to join Local 429. (*See* Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment ("Plaintiffs' Memo"), Doc. No. 44 at 2 ("Plaintiffs accept the

Defendants' Joint Statement of Facts as a complete and accurate rendition of the relevant facts.")). Plaintiffs determined to become Union members, rather than pay a fair share fee. Whatever their motivations, the decision was personal to each individual and Plaintiffs have provided no evidence that their decision was anything but voluntary when they signed their membership agreements.[1]

Plaintiffs knowingly decided to join Local 429, despite the option not to join. (Defendants Joint Statement of Facts ("Joint Statement"), ¶¶ 20, 33, 44, 54). Plaintiff Unger opted not to join Local 429 when she began her employment, and instead paid a fair share fee for approximately two years before *then* choosing to join. (*Id.* ¶¶ 43, 44). Plaintiffs had notice of their right to join or refrain from joining Local 429 in accordance with the applicable provisions of PERA, the collective bargaining agreement between Lebanon County and Local 429 ("CBA") and the membership applications and dues authorizations they signed.[2]

PERA provides that "public employes" may "organize, form, join or assist in employe organizations," engage in concerted activity, and bargain collectively. 43

[1] *See, e.g.*, Checkoff Authorization and Assignment of Plaintiff Douglas, Ex. A to Declaration of Bolig, Doc. No. 27-1 at 12 ("This authorization [to deduct Union dues] is voluntary and is not conditioned on my present or future membership in the Union.").

[2] *See, e.g.*, Membership Application signed by Plaintiffs Felker and Unger, Ex. A to Supplemental Declaration of Bolig, Doc. No. 50 at ¶ 4 ("I voluntarily submit this Application for Membership"; "I understand that under current law, I may elect 'nonmember' status"; and, "I have read and understand the options available to me and submit this application to [b]e admitted as a member of the Local Union.").

P.S. § 1101.401. That provision goes on to provide that "employes shall also have the right to refrain from any or all such activities," with only the proviso that their choice to refrain may be subject to a maintenance of membership provision—a provision applicable only to those who opted to join the union. *Id*.

The CBA similarly provides that Lebanon County is to deduct "dues from the pay of those employees who individually request in [writing] that such deduction be made or fair share." (Joint Statement ¶ 18). Finally, the authorization cards signed by Plaintiffs state that the agreement is "voluntary" and "irrevocable for the term of the applicable contract . . . or for one year . . . ." (Ex. A to Decl. of Bolig, Doc. No. 27-1; *see also id.* at Ex. B (providing "I may elect 'nonmember' status," that nonmembers who object are "entitled to a reduction in fees," and that the signer "read and underst[ood] the options available to" him)).

Plaintiffs are in error when they suggest this Court should "presume acquiescence in the loss of fundamental rights," as argued by Plaintiffs; the statute, CBA, and authorization forms make explicit the options Plaintiffs enjoyed and what actions they agreed to take upon signing their authorizations and joining the Union. (Plaintiffs' Memo, Doc. No. 44, at 5). The Supreme Court in *Janus* explained that "*[b]y agreeing to pay*, nonmembers are waiving their First Amendment rights . . . ." *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (emphasis added). The *Janus* decision

does not require any particular recitation of rights; instead, it was limited to the situation in which fair share fees were deducted automatically from *non-members without their consent*, and imposes a requirement to *consent to agency or fair share fees*. *Id.* In fact, the Court noted that "States can keep their labor-relations systems *exactly as they are*—only they cannot force *nonmembers* to subsidize public sector unions." *Id.* at n.27 (emphasis added). Here, Plaintiffs elected to join Local 429, and have no viable claim before this Court.[3]

C. Count I Is Moot.

Plaintiffs are no longer members of Local 429, have been released from their membership obligations and have been refunded all dues deducted since the date of their resignation requests. Dues cannot be assessed again without Plaintiffs rejoining Local 429, as the challenged maintenance of membership provisions only apply to union members. The related doctrines of standing and mootness deprive this Court of subject-matter jurisdiction over Plaintiffs' complaint.

[3] The cases cited by Plaintiffs in support of their waiver argument miss the mark. They deal with "constructive waiver" of: *sovereign immunity*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 681-82 (1999); intelligent, intentional relinquishment or abandonment of a known right or privilege, specifically, *the right to counsel in a habeas petition*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding waiver must be determined by trial court to be intelligent and competent, and determination should be on the record); and, lack of warning indicated lack of consent to using price trends instead of "evidence of value" of property being "gathered in the usual way" in a *utility rate refund case*. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937). All of these cases are inapposite.

It is "absolutely clear" that the alleged violations cannot "reasonably be expected" to happen again. *Friends of the Earth v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *see also Sands v. Nat'l Labor Relations Bd.*, 825 F.3d 778, 785 (D.C. Cir. 2016) (finding alleged violation would not happen again when it required plaintiff to return to her former position). Plaintiffs will never be subject to the challenged maintenance of membership provisions again absent their written consent to authorize dues deductions and rejoin Local 429; thus, it is not an event capable of repetition.

In a recent case with similar facts, the U.S. District Court for the Middle District of Pennsylvania granted defendants' motion to dismiss for lack of standing and mootness, determining it lacked subject-matter jurisdiction over the claims. *See Molina v. Pa. Soc. Servs. Union*, C.A. No. 19-0019, 2019 WL 3240170, ___ F. Supp. 3d ____ (M.D. Pa. July 18, 2019) (Kane, J.) (attached as Exhibit "A").[4] In *Molina*, the court determined plaintiff lacked standing to pursue declaratory and injunctive relief, because plaintiff was no longer a member of the Pennsylvania Social Services Union and was no longer employed by Lehigh County, despite the fact that he could be reinstated pending his grievance and arbitration decisions. *Id.*

[4] Although *Molina* can be distinguished on the grounds that the employee left public sector employment, the court explicitly took this factor into account and determined it was unlikely that he would be reinstated and that defendants would resume enforcement of the challenged provisions of PERA and the CBA. *Molina*, 2019 WL 3240170 at *8 n.13.

at *8. The court reasoned that plaintiff's claims for declaratory and injunctive relief were based on an "unknown event at some unknown time" and, therefore, presented no live case or controversy. *Id.* (citation omitted) (dismissing claims for retroactive relief as moot); *see also Diamond v. Pa. State Educ. Ass'n*, C.A. No. 18-128, 2019 WL 2929875, at *8-13 (W.D. Pa. July 8, 2019) (Gibson, J.) (attached as Exhibit "B") (dismissing claims against Commonwealth Defendants by nonmember, fair-share fee payers, finding no ongoing violation of federal law, and, alternatively, because Attorney General and Pennsylvania Labor Relations Board members were inappropriate defendants since none could enforce challenged provision).[5]

[5] While Plaintiffs cite *Fisk v. Inslee*, 759 F. App'x 632 (9th Cir. Jan. 9, 2019) for the proposition that their claims are not moot "simply because" Local 429 "is no longer deducting" dues from their pay, that case affirmed the trial court's grant of summary judgment in favor of the State of Washington and the Union. *Id.* at 634. The appellate court determined that plaintiffs' First Amendment rights were not violated by "deduction of union dues in accordance with the membership cards' dues irrevocability provision . . . ." *Id.* at 633. "[T]he First Amendment does not preclude the enforcement of 'legal obligations' that are bargained-for and 'self-imposed' under state contract law." *Id.* (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668-71 (1991). The cards included the irrevocability period

> in clear, readable type on a simple one-page form, well within the ken of unrepresented or lay parties. Moreover, temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts—e.g., gym memberships or cell phone contracts—and we conclude that under state contract law those provisions should be similarly enforceable here.

Here, Plaintiffs have not alleged an ongoing violation of law, nor have they pointed to a live controversy which would be resolved by a declaratory judgment from this Court. Plaintiffs have already received all relief to which they could be entitled and, therefore, judgment should be entered in favor of Commonwealth Defendants as a matter of law.

D. Recognition of an Exclusive Bargaining Representative Does Not Violate the First Amendment Rights of Plaintiffs.

Plaintiffs allege generally that the exclusive representation arrangement "demeans their First Amendment rights." (Plaintiffs' Memo, Doc. No. 44 at 27). However, Plaintiffs cite to no speech or action of Local 429 that constitutes a deprivation of their constitutional rights. As the undisputed facts establish, Plaintiffs may speak for themselves and associate with whomever they please.

The invocation of *Janus* does nothing to bolster their argument, as the Court explicitly held that "[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees . . . ." *Janus*, 138 S. Ct. at 2478. The Court explained that its opinion regarding agency fees was "not in any way questioning the foundations of modern labor law," and that States "can keep their labor-relations systems exactly as they are—only they cannot force

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Id. at 633-34. If this Court determines it does not lack subject-matter jurisdiction on standing or mootness grounds, it could alternatively determine Plaintiffs are not entitled to relief on Count I in keeping with *Fisk*, because they voluntarily consented to membership and dues deductions, including the irrevocability period.

nonmembers to subsidize public-sector unions." *Id.* at 2471 n.7, 2485 n.27. *Janus* concerned fair share fees deducted without authorization of the employee, not deductions that the employee herself authorized, as here.

Plaintiff's narrow view of *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984), is likewise in error, as the Court in that case upheld a more restrictive exclusive representation scheme than the one at issue in this case. The *Knight* Court found the nonmember plaintiffs' rights "wholly unimpaired" by the exclusive "meet and negotiate" and "meet and confer" scheme. *Knight*, 465 U.S. at 290 n.12. After *Knight*, "every circuit court to address the constitutionality of exclusive bargaining arrangements (as distinct from the constitutionality of compelling financial support [via fair-share fees] for such bargaining arrangements) has concluded that these provisions do not violate the First Amendment." *Mentele v. Inslee*, 916 F.3d 783, 787 (9th Cir. 2019) (listing cases) *petition for cert. filed sub nom. Miller v. Inslee* (U.S. May 29, 2019) (No. 18-1492). The appellate court explained that *Janus* expressly sanctioned exclusive representation, despite finding it caused some infringement of First Amendment rights. *Id.* at 787-88. In contrast, *Knight* found the Minnesota scheme left nonmembers' freedoms "wholly unimpaired." *Id.* at 788 (quoting *Knight*, 465 U.S. at 290 n.12).

The plaintiff in *Mentele* sought only to be "left alone to make her own decisions regarding associations and her speech," as Plaintiffs seem to claim here. *Id.* at 788-89. The *Knight* system "in no way restrained [plaintiffs'] . . . freedom to associate *or not to associate with whom they please, including the exclusive representative*," and the *Mentele* court applied "*Knight*'s more directly applicable precedent" rather than *Janus* in upholding the exclusive representation scheme. *Id.* at 789 (internal citations and quotations omitted). The court determined that even if *Knight* did not bind it, it would reach the same conclusion, as it found that the exclusive representation scheme survived exacting scrutiny, serving the compelling state interest of labor peace, noting *Janus* approved of the scheme, and finding no significantly less restrictive means. *Id.* at 790-91.

Therefore, judgment should be entered as a matter of law on Count II.

III. CONCLUSION

For any and all of the reasons set forth in their moving papers and herein, Commonwealth Defendants respectfully request that this Honorable Court grant their Motion for Summary Judgment and enter judgment as a matter of law in their favor.

Respectfully submitted,

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Date: 13 August 2019

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th of August, 2019, I caused to be served a true and correct copy of the foregoing document to all counsel of record via ECF.

s/ Caleb C. Enerson
CALEB CURTIS ENERSON
Deputy Attorney General