UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3878 Caption [use short title] Solomon v. AFSCME DC 37

Motion for: Summary Affirmance

Set forth below precise, complete statement of relief sought:

Summary affirmance of the District Court's judgment for Defendant-Appellee AFSCME District Council 37.

MOVING PARTY: Appellee AFSCME DC 37 **OPPOSING PARTY:** Appellant Scott Solomon

- ☐ Plaintiff ☐ Defendant
- ☐ Appellant/Petitioner ☑ Appellee/Respondent

MOVING ATTORNEY: **OPPOSING ATTORNEY:**

[name of attorney, with firm, address, phone number and e-mail]

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Jeffrey M. Schwab, Liberty Justice Center
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Court- Judge/ Agency appealed from: U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): ☑ Yes ☐ No (explain):

Opposing counsel's position on motion: ☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response: ☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Jacob Karabell **Date:** 12/1/20 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCOTT SOLOMON, Plaintiff-Appellant, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 37, AFL-CIO, Defendant-Appellee.	)	No. 20-3878

DEFENDANT-APPELLEE'S UNOPPOSED MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and this Court's Local Rule 27, Defendant-Appellee AFSCME District Council 37 ("District Council 37" or "the Union") hereby moves for summary affirmance of the District Court's judgment, as Plaintiff-Appellant Scott Solomon's sole claim—seeking the repayment of fair-share fees remitted to the Union prior to June 27, 2018— is squarely foreclosed by this Court's recent decision in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020). Plaintiff does not oppose this motion, but he may file a response to make clear that he does not concede that *Wholean* was correctly decided and that he intends to petition the Supreme Court for certiorari.

The grounds supporting the Union's unopposed motion for summary affirmance are further set forth below.

BACKGROUND

This lawsuit is one of dozens filed across the country since the Supreme Court's June 27, 2018 decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in which plaintiffs seek to recover "fair-share fees" (also called "agency fees") they paid to the union that represented them in collective bargaining in accordance with the requirements of state law. In *Janus*, the Supreme Court overruled its 40-year-old precedent in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court had held that public employees who declined to become dues-paying union members could, consistent with the First Amendment, be required as a condition of employment to contribute their proportionate share of the union's costs of collective bargaining and contract administration. Overturning that precedent, *Janus* held that such fair-share requirements are unconstitutional in the public sector.

Plaintiff worked as a city planner for the City of New York, a position that is part of a bargaining unit represented by District Council 37, from October 2014 to July 2018. Complaint (attached as Exhibit A) ¶¶ 2, 7. During this period, Plaintiff was not a dues-paying member of the Union. *Id.* ¶ 9. As authorized under New York Civil Service Law § 208(3)(b) and *Abood*, Plaintiff had a fair-share fee deducted from his wages and remitted to the Union until June 27, 2018, Complaint ¶¶ 9-10—the date on which the Supreme Court decided *Janus*.

More than a year after *Janus*, Plaintiff, on behalf of himself and a putative class of New York City employees who had fair-share fees deducted from their paychecks prior to *Janus*, filed a complaint under 42 U.S.C. § 1983 in the District Court. That complaint sought "actual damages in the full amount of fair share fees and assessments" deducted from nonmembers' paychecks before *Janus*—*i.e.*, at a time when fair-share fees were expressly authorized by New York state law and the Supreme Court's *Abood* decision. *Id.*, Prayer for Relief, subsection (c).

The District Court, at the parties' request, stayed proceedings pending this Court's disposition of the appeal in *Wholean v. CSEA SEIU Local 2001*, No. 19-1563. *See* District Court ECF No. 16. *Wholean* also involved a § 1983 claim, brought by one of the advocacy organizations that represents Plaintiff in this case, seeking damages in the amount of pre-*Janus* fair-share fees. On April 15, 2020, this Court decided *Wholean*, affirming the district court's dismissal of the complaint in that case and holding that "a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983." 955 F.3d at 334. The *Wholean* plaintiffs filed a petition for rehearing en banc, which this Court denied. Order Denying Reh'g En Banc, *Wholean v. CSEA SEIU Local 2001*, No. 19-1563, ECF No. 104 (June 9, 2020).[1]

[1] The plaintiffs in *Wholean* filed a petition for certiorari with the Supreme Court on October 30, 2020. *See* No. 20-605 (U.S.).

After this Court decided *Wholean*, the District Court lifted the stay in this case, and the Union filed a motion to dismiss the Complaint on the basis of *Wholean*. In response, Plaintiff "acknowledge[d] that *Wholean* is currently controlling circuit precedent that requires this Court to grant District Council 37's motion to dismiss." District Court ECF No. 25 at 3 (attached as Exhibit B).[2] The District Court granted the Union's motion to dismiss in a one-page summary order on October 13, 2020. Dist. Ct. Op. (attached as Exhibit C).[3]

ARGUMENT

While a motion for summary affirmance is "a rare exception to the completion of the appeal process," such a motion should be granted when an appeal "'lacks an arguable basis either in law or in fact.'" *United States v. Davis*, 598 F.3d 10, 13 (2d Cir. 2010) (quoting *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007)).

One example of a situation in which an appeal "lacks an arguable basis . . . in law" is where a plaintiff acknowledges that his claim is foreclosed by binding precedent but wants to preserve a legal issue for possible Supreme Court review. In *Bonilla v. United States*, 618 F.3d 102 (2d Cir. 2010), for example, the defendant

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[2] Plaintiff also did not oppose the Union's motion to dismiss Plaintiff's claim for a declaratory judgment. *See* Complaint, Prayer for Relief, subsection (b).

[3] This Court has jurisdiction over Plaintiff's appeal under 28 U.S.C. § 1291. The District Court had subject-matter jurisdiction over Plaintiff's Complaint, pursuant to 28 U.S.C. §§ 1331 and 1343. The District Court issued a final judgment on October 14, 2020, dismissing all of Plaintiff's claims. Plaintiff's notice of appeal, filed on November 13, 2020, was timely. *See* Fed. R. App. P. 4(a)(1)(A).

acknowledged that one of his arguments was foreclosed by binding precedent, but nonetheless opposed the government's motion for summary affirmance on the ground that he sought "to preserve the issue for review by the Supreme Court." *Id.* at 112. This Court granted the government's summary-affirmance motion, holding that the defendant's argument was "beside the point" because "[c]lear legal precedent . . . dictates the defeat of his claim." *Id.* The Court added that the defendant "may raise the issue in a certiorari petition to the Supreme Court, challenging summary affirmance just as he could on appeal from an affirmance following full briefing." *Id.*

As in *Bonilla*, both parties to this appeal acknowledge that Plaintiff's claim is foreclosed by binding precedent—specifically, this Court's decision in *Wholean*. In *Wholean*, the plaintiffs sought "the return pursuant to 42 U.S.C. § 1983 of all fair-share fees collected by [the defendant union] pre-*Janus*," which were authorized by state law and the Supreme Court's then-controlling decision in *Abood*. 955 F.3d at 334. The district court had granted the union's motion to dismiss, holding that the union could assert a good-faith defense to the plaintiffs' claim for damages based on the union's reliance on existing law. *Id.*

This Court affirmed, holding that "a party who complied with directly controlling Supreme Court precedent in collecting fair-share fees cannot be held liable for monetary damages under § 1983." *Id.* at 334. The Court first noted that the Supreme Court, in *Wyatt v. Cole*, 504 U.S. 158 (1992), had suggested that private parties could assert a good-faith defense to § 1983 claims for monetary liability when

they relied on a state statute. 955 F.3d at 334-35. Such a good-faith defense, this Court held, foreclosed the plaintiffs' claim for damages: "Because Appellees collected fair-share fees in reliance on directly controlling Supreme Court precedent and then-valid state statutes, their reliance was objectively reasonable, and they are entitled to a 'good-faith' defense as a matter of law." *Id.* at 336. In so holding, this Court joined the other courts of appeals that have addressed § 1983 claims seeking the repayment of pre-*Janus* fair-share fees, with all six circuits rejecting such claims. *Id.* at 335 & n.2 (citing cases); *see also Doughty v. State Emps. Ass'n of N.H.*, --- F.3d ---, 2020 WL 7021600 (1st Cir. Nov. 30, 2020); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020).

This Court went on to reject the *Wholean* plaintiffs' additional argument that the defendant union and the state defendants "should have anticipated *Janus* and ceased collecting fair-share fees on that basis." *Id.* at 334. The Court explained that the defendants "cannot reasonably be deemed to have forecasted whether, when, and how *Abood* might be overruled. Instead, they were entitled to rely on directly controlling Supreme Court precedent, and in good faith, they did so." *Id.* at 336.

Wholean compels the affirmance of the District Court's decision in this case, as AFSCME District Council 37—like the defendant union in *Wholean*—relied on state law and *Abood* in collecting fair-share fees prior to the Supreme Court's decision in *Janus*. In sum, the Union's "reliance was objectively reasonable, and [the Union is] entitled to a 'good-faith' defense as a matter of law." *Id.* at 336.

This Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). *Wholean* squarely controls the outcome in this case, as Plaintiffs have acknowledged. Plaintiff's appeal thus "lacks an arguable basis . . . in law," *Davis*, 598 F.3d at 13, and this Court should summarily affirm the District Court's judgment.

CONCLUSION

AFSCME District Council 37's motion for summary affirmance should be granted.

Respectfully submitted,

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Dated: December 1, 2020

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,554 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Garamond font.

/s/ Jacob Karabell

RULE 26.1 DISCLOSURE STATEMENT

Defendant-Appellee AFSCME District Council 37, as a labor organization, is an unincorporated association and thus has no corporation that owns 10% or more of its stock.

/s/ Jacob Karabell

Dated: December 1, 2020

CERTIFICATE OF SERVICE

I, Jacob Karabell, an attorney, hereby certify that on December 1, 2020, I caused the foregoing Defendant-Appellee's Unopposed Motion for Summary Affirmance to be filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. I further certify that as of December 1, 2020, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ Jacob Karabell

Exhibit A

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOTT SOLOMON, Plaintiff, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 37, AFL-CIO, Defendant.	)	No. **COMPLAINT (CLASS ACTION)**

COMPLAINT

1. The U.S. Supreme Court has concluded that unions acted unconstitutionally when they deducted tens of millions of dollars from public-sector employees who were not members of a union, but were required to pay agency fees to the union against their will. *See Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Plaintiff, individually and on behalf of a class of all agency fee-payers as a class whose money was taken by American Federation of State, County and Municipal Employees, District Council 37, AFL-CIO, ("District Council 37"), sues for the return of their wrongfully-seized money under 42 U.S.C. § 1983.

PARTIES

2. Plaintiff Scott Solomon served as a city planner in the Queens office of the New York City Department of City Planning from October 2014 to July 2018 and resides in Ronkonkoma, New York.

3. District Council 37 is a labor union representing public sector employees across New York City. Its main offices in New York City, New York.

JURISDICTION AND VENUE

4. This case raises claims under the First and Fourteenth Amendments of the United State Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

5. Venue is appropriate under 28 U.S.C. § 1391(b) because District Council 37 has its headquarters in and a substantial portion of the events giving rise to the claims occurred in the Southern District of New York.

FACTUAL ALLEGATIONS

6. The New York Public Employees' Fair Employment Act mandates that a union certified as an exclusive representative "shall be entitled to have deducted from the wage or salary of employees of such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization…" NY Civ Serv L § 208(b) (2016). Exclusive representatives are entitled to these fees, and public employers are required to withhold them and transmit them to the union. *See Re Onondaga-Cortland-Madison BOCES Federation of Teachers, NYSUT, AFT # 2897*, 1992 PERB No. U-12308, at 7-8.

7. District Council 37 is the exclusive representative for classified employees of the mayoral agencies, the Health and Hospitals Corporation, the Off-Track Betting Corporation, the City Housing Authority, the Comptroller, the District Attorneys, the Borough Presidents, the Public Administrators, and any museum, library, zoological garden, or other cultural institution whose salary is paid in whole from the City Treasury, as recognized by the collective bargaining agreement between District Council 37 and the City of New York.

8. The collective bargaining agreement between District Council 37 and the City of New York initially covered January 1, 1995 to June 30, 2001, but continues in force to today with supplemental Memoranda of Agreement, the most recent of which was signed June 25, 2018.

9. Prior to June 28, 2018, all employees in the bargaining units represented by District Council 37 who were not union members, including the Plaintiff, were forced to pay "fair-share fees" to District Council 37 as a condition of their employment.

10. Prior to June 28, 2018, municipal employers covered by the collective bargaining agreement deducted fair share fees from Plaintiff's and other nonmembers wages without their consent and, upon information and belief, transferred those funds to District Council 37, which collected those funds.

11. During times after June 1, 2016, District Council 37 should have known that its seizure of fair share fees from non-consenting employees likely violated the First Amendment.

CLASS ACTION ALLEGATIONS

12. This case is brought as a class action under Federal Rule of Civil Procedure 23(b)(3) by Plaintiff for himself and for all others similarly situated. The class consists of all current and former New York City employees from whom District Council 37 collected fair share fees pursuant to its collective bargaining agreement with the City of New York within the applicable statute of limitations.

13. Upon information and belief, the number of persons in the class is so numerous that joinder is impractical.

14. There are questions of law and fact common to all class members, including Plaintiff. The constitutional violations perpetrated by District Council 37 against all nonmembers

were taken according to the same statutes and collective bargaining agreement. The legal question of whether District Council 37 owes damages to class members from whom it unconstitutionally seized fair share fees is common to all class members.

15. Plaintiff's claim is typical of class members' members claims because all concern whether District Council 37 owes damages to class members from whom it unconstitutionally seized fair share fees.

16. Plaintiff will adequately represent the class and has no conflict with other class members.

17. The class can be maintained under Federal Rule of Civil Procedure 23(b)(3) because questions of law or fact common to the members of the class predominate over any questions affecting only individual members, in that the important and controlling questions of law or fact are common to all class members, i.e., whether the aforementioned fee deductions violate their First Amendment rights. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, inasmuch as the individual respective class members are deprived of the same rights by District Council 37's actions, differing only in the amount of money deducted. This fact is known to District Council 37 and easily calculated from its business records. The limited amount of money involved in the class of each individual's claim would make it burdensome for the respective class members to maintain separate actions.

CAUSE OF ACTION

18. The allegations contained in all preceding paragraphs are incorporated herein by reference.

19. District Council 37 acted under color of state law and in concert with the City of New York when it compelled Plaintiff and class members to pay fair share fees, caused the government to deduct fair share fees from the Plaintiff and class members, and collected fair share fees seized from the Plaintiff and class members.

20. District Council 37, by requiring the payment of fair share fees as a condition of employment and by collecting such fees, violated Plaintiff's and class members' First Amendment rights to free speech and association, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court:

a. Certify the Class; and

b. Enter a judgment declaring that District Council 37 violated Plaintiff's and class members' constitutional rights by compelling them to pay fair share fees as a condition of their employment and by collecting fair-share fees from them without consent; and

c. Award Plaintiff and class members actual damages in the full amount of fair share fees and assessments seized from their wages, plus interest, for violations of their First Amendment Rights;

d. Award the Plaintiff his costs and attorneys' fees under 42 U.S.C. § 1988; and

e. Award any further relief to which Plaintiff may be entitled.

Dated: July 22, 2019

Respectfully Submitted,

SCOTT SOLOMON,

By: /s/

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Exhibit B

Plaintiff's Response to Motion to Dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Scott Solomon, Plaintiff, v. American Federation of State, County and Municipal Employees, District Council 37, AFL-CIO, Defendant.	No. 1:19-cv-06823-GBD Hon. Judge George B. Daniels **Response to Motion to Dismiss**

Plaintiff Scott Solomon served as a city planner in the Queens office of the New York City Department of City Planning from October 2014 to July 2018. During that time, he was forced, against his will, to pay agency fees to the American Federation of State, County and Municipal Employees, District Council 37, AFL-CIO ("District Council 37" or the "Union"), pursuant to the collective bargaining agreement between District Council 37 and the City of New York and New York state law. NY Civ Serv L § 208(b) (2016). In June 2018, the Supreme Court in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), held agency fee requirements unconstitutional under the First Amendment. In this case, Solomon seeks, for himself and putative class of similarly situated employees, damages from District Council 37 for the agency fees it unlawfully seized from nonconsenting employees prior to the Supreme Court's decision *Janus*.

Shortly after filing this case, the parties moved jointly to stay the proceedings because the Second Circuit Court of Appeals was considering *Wholean v. CSEA*

SEIU Local 2001, No. 19-1563, in which plaintiffs, like Solomon here, sought the return of agency fees remitted from non-members of the defendant union prior to the Supreme Court's decision in *Janus*. (ECF No. 14). This Court entered an order staying this case until a decision in *Wholean* was reached. (ECF No. 16).

On April 15, 2020, the Second Circuit issued its opinion in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), holding that a "good-faith defense" shields public-sector unions from liability under 42 U.S.C. § 1983 for seizing agency fees from nonconsenting employees.

On May 6, 2020, District Council 37 filed a notice of decision in *Wholean* and asked this Court to remove the stay. (ECF No. 17). On May 8, 2020, Solomon filed a motion to extend the stay until the Second Circuit ruled on the *Wholean* plaintiffs' petition for rehearing *en banc*. (ECF No. 18). On May 15, 2020, this Court denied Plaintiff's motion and lifted the stay, giving District Council 37 until July 31, 2020 to file a motion to dismiss. (ECF No. 21).

District Council 37 filed a motion to dismiss on May 26, 2020. (ECF No. 23). As District Council 37 points out in its supporting memorandum, the relief Solomon seeks for himself and putative class members currently is foreclosed by the Second Circuit's decision in *Wholean* — i.e., damages for the agency fees the Union unlawfully seized from Solomon and putative class members before the Supreme Court's decision in *Janus*. (ECF No. 24, p. 5).

To be clear, Solomon does not concede that the Second Circuit's decision in *Wholean* is correctly decided. The Court in *Wholean* erred in finding there to be a

good faith defense to Section 1983 liability because, among other reasons, that conclusion is: (1) incompatible with Section 1983's text, which mandates that "[e]very person, who acts under color of any statute" to deprive others of their constitutional rights "shall be liable to the party injured in an action at law," 42 U.S.C. § 1983; (2) incompatible with the statutory basis for immunities; (3) incompatible with "[e]lemental notions of fairness [that] dictate that one who causes a loss should bear the loss," *Owen v. City of Indep.*, 445 U.S. 622, 654 (1980); (4) incompatible with Section 1983's remedial purposes; and (5) incompatible with *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), which held that courts cannot avoid the retroactive effects of Supreme Court decisions by deeming it a defense that a party relied on a statute before it was held unconstitutional. Moreover, *Wholean* recognized a defense far broader than the defense to malice and probable cause elements of abuse of process claims that was suggested by several Justices in *Wyatt v. Cole*, 504 U.S. 158 (1992) and adopted by the Third and Fifth Circuits. Solomon reserves his right to appeal and challenge the *Wholean* decision and District Council 37's invocation of a good defense before the Second Circuit and Supreme Court.

Nonetheless, Solomon acknowledges that *Wholean* is currently controlling circuit precedent that requires this Court to grant District Council 37's motion to dismiss.

Dated: June 9, 2020

Respectfully submitted,

/s/ Jeffrey M. Schwab

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Counsel for Plaintiff Scott Solomon

CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, certify that on June 9, 2020, I caused the foregoing Response to Motion to Dismiss to be filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. I further certify that as of June 9, 2020, there are no nonregistered participants upon whom service by U.S. Mail is required.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

Exhibit C

District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SCOTT SOLOMON,

Plaintiff,

-against-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 37, AFL-CIO,

Defendant.

ORDER

19 Civ. 6823 (GBD)

GEORGE B. DANIELS, United States District Judge:

On May 26, 2020, Defendant moved to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. (Notice of Mot. to Dismiss, ECF No. 23.) In his response to Defendant's motion, Plaintiff concedes that the recent decision by the United States Court of Appeals for the Second Circuit in *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), forecloses the relief sought by Plaintiff in the above-captioned action. (*See* Resp. to Mot. to Dismiss, ECF No. 25, at 2.) Accordingly, Plaintiff acknowledges that *Wholean* requires this Court to grant Defendant's motion to dismiss. (*Id.* at 3.) Defendant's motion to dismiss, (ECF No. 23), is GRANTED.

The Clerk of Court is directed to close this motion accordingly.

The conference scheduled for October 21, 2020 at 9:45 am is canceled.

Dated: New York, New York
October 13, 2020

SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge