IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

VANESSA E. CARBONELL; et al. Plaintiffs v. ANTONIO LÓPEZ FIGUEROA, in his personal capacity and in his official capacity as Commissioner of the Puerto Rico Police Bureau; et al. Defendants	CASE NO. 22-cv-1236 (WGY) CLASS ACTION COMPLAINT Constitutional Violation Action (42 U.S.C. § 1983) Declaratory Judgment, Injunctive Relief, Compensatory, Nominal, and Punitive Damages. Jury Trial Demanded

UNION OF ORGANIZED CIVILAN EMPLOYEE'S MOTION TO DISMISS

TO THE HONORABLE COURT:

COMES NOW Defendant, Union of Organized Civilian Employees (the "Union"), through the undersigned counsel and very respectfully moves the Court to dismiss Plaintiffs' Amended Class Action Complaint (the "Complaint"), **ECF No. 22**, pursuant to Fed. R. Civ. P. 12(b)(6) and the following arguments.

I. INTRODUCTION

On August 28, 2022, Plaintiffs Vanessa E. Carbonell ("Carbonell"), Roberto A. Whatts-Osorio ("Whatts"), Elba Y. Colón-Nery ("Colón"), Billy Nieves-Hernández ("Nieves"), Nelida Álvarez-Febus ("Álvarez"), Linda Dumont-Guzmán ("Dumont"), Sandra Quiñones-Pinto ("Quiñones"), Yomarys Ortiz-González ("Ortiz-González), Carmen Berlingeri-Pabón ("Berlingeri"), Merab Ortiz-Rivera ("Ortiz"), and Janet Cruz-Berrios ("Cruz") (collectively, "Plaintiffs"), filed the Complaint against Antonio López

Figueroa, in his personal capacity and in his official capacity as Commissioner of the Puerto Rico Police Bureau (the "Bureau"), Jojanie Mulero Andino, in her personal capacity and in her official capacity as Human Resources Director of the Bureau, and against the Union. **ECF No. 22**.

In a nutshell, Plaintiffs allege that they were unionized employees in the public sector, who had been represented by the Union but later cancelled their Union memberships. Having cancelled their Union memberships, Plaintiffs claim to have been stripped of an employer contribution to their health insurance, to which they had been previously entitled. Plaintiffs claim that when the Bureau allegedly took the decision to stop providing them with the Additional Contribution, it "coerced" them into joining the Union, thereby infringing their First Amendment rights. Thus, Plaintiffs state a cause of action under 42 U.S.C. § 1983 in their individual capacities and in representation of a putative class of other Bureau employees.

In accordance with the foregoing arguments and pursuant to Fed. R. Civ. P. 12(b)(6), the Union respectfully moves the Court to dismiss Plaintiffs' claims against it. As will be argued below, Plaintiffs failed to adequately plead a Section 1983 claim, insofar as any conduct to which they object does not constitute retaliation for protected speech. They also fail to plead how the Union engaged in a state action or how the Union's alleged participation in the allegations was a proximate cause of their alleged injuries. And even if Plaintiffs had a tenable cause of action under Section 1983, the Union is entitled to qualified immunity, since it breached no legal obligation that has been clearly established. Additionally, the majority of the plaintiffs' claims are time-barred, and all of them failed

to exhaust the exclusive contractual remedies provided by the same document which conferred upon them the benefits here at issue. Lastly, Plaintiffs also failed to adequately plead the requisite facts for the Court to certify the putative class.

II. FACTUAL BACKGROUND[1]

Plaintiffs are eleven (11) employees of the Bureau who all work at its main headquarters in San Juan, Puerto Rico. **ECF No. 22**, ¶¶ 28-38. Before June 27, 2018, all but one (1) of the Plaintiffs were members of the Union, whereas the other paid agency fees. Id. at ¶ 8. After the Supreme Court's ruling in Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018),[2] all Plaintiffs objected to continued Union membership and to the deduction of Union dues and agency fees. **ECF No. 22**, ¶ 11.

Thereafter, Plaintiffs allege that the Bureau informed the Union of their objections. Id. at ¶ 12. Plaintiffs aver that the Union responded to these objections by asking the Bureau to stop awarding certain benefits to employees who objected to Union membership and/or deduction of dues or agency fees. Id. at ¶ 13. Thus, Plaintiffs allege to have been stripped of these benefits at different points in time by the Bureau. Id. at ¶¶ 51-52, 56-57, 61-62, 66-67, 71-72, 76-77, 81-82, 86-87, 92-93, & 97-98.

The benefits here at issue relate to the Bureau's contribution to employees' health insurance plans. Id. at ¶ 4. Pursuant to state law, the Bureau provides all employees with

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[1] For purposes of a Motion to Dismiss, the well-pleaded facts of the Complaint are taken as true. Feliciano-Hernández v. Pereira-Castillo, 663 F.3d 527, 532 (1st Cir. 2011). The Union's recitation of those facts should not be construed as an admission or a waiver of any right to contest them or advance alternative facts.

[2] In Janus, the Supreme Court concluded that "public-sector agency-shop arrangement violate the First Amendment," i.e., that a public employer may not compel employees to pay union dues or agency fees. 138 S. Ct. at 2478.

an initial contribution of $100 per month. Id. at ¶¶ 5-6 (quoting P.R. Laws Ann. tit. 3, § 729h). However, Plaintiffs claim that they were provided with an additional contribution of $25 per month (the "Additional Contribution"), due to "written policy" of the Union and the Bureau. **ECF No. 22**, ¶ 9. And it is this Additional Contribution which the Bureau allegedly stopped granting Plaintiffs after they stopped paying union dues and agency fees. Id. at ¶ 14.

With their allegation, Plaintiffs admit that the Additional Contribution is not a creature of statute but that it stems from an agreement between the Union and the Bureau. The agreement in question is the Collective Bargaining Agreement dated November 14, 2013, by and between the Union and the Bureau (the "CBA"). See generally, **Exhibit A**.[3] Pursuant to Article 11 of the CBA, the Bureau agreed to provide an additional employer contribution of $25.00 per month to all members of the Appropriate Unit.[4] **Exhibit A**, Art. 11. Thus, the Additional Contribution claimed by Plaintiffs is a contractually created right, subject to the terms and conditions of the CBA.

Although originally executed in November 2013, the CBA has been continuously in effect during the relevant timeframe. Pursuant to a stipulation by the Bureau and the

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[3] If a collective bargaining agreement is integral to or relied upon in the complaint, courts may consider it for purposes of ruling on a motion to dismiss. Warner v. Atkinson Freight Lines Corp., 350 F. Supp. 2d 108, 112 (D. Me. 2004) (citing Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 32 (1st Cir. 2000)). That is the case here.

[4] At the time, and pursuant to Sections 1 and 2 of Article 39 of the CBA, the Appropriate Unit consisted solely of union members and non-union members who paid agency fees. **Exhibit A**, Art. 39, §§ 1-2 The CBA simply did not contemplate the presence of non-members who did not pay agency fees, since Janus would not be issued until nearly five years thereafter, which then abrogated existing case law.

Union dated June 30, 2021, the parties had previously extended the CBA to June 30, 2021, and agreed to further extend it to June 30, 2022. **Exhibit B**.

Plaintiffs claim that they are owed the Additional Contribution, although this contribution was obtained by the Union on behalf of its dues-paying members and agency-fees-paying nonmembers. And Plaintiffs no longer fall under either category. In other words, and in light of Janus—which was decided nearly five years after execution of the CBA—Plaintiffs ask the Court to reinterpret the parties' CBA to confer upon them the Additional Contribution, through a conclusory allegation that the Bureau's refusal to extend the Additional Contribution to non-union members who do not pay agency fees is an act to "coerce" Union membership. **ECF No. 22**, ¶ 108. And on that basis, they cloak a contractual controversy in the garb of a Section 1983 claim, for purposes of obtaining federal jurisdiction and to dissemble their failure to comply with the CBA's grievance resolution procedures.

Plaintiffs also seek to bring their claims on behalf of a class. Id. at ¶¶ 109-19. In that vein, they make rote restatements of the requirements provided by Fed. R. Civ. P. 23, without any supporting facts. They allege the class to be numerous, without at any point precising the number of affected employees. **ECF No. 22**, ¶ 111. They allege their claims to be typical of the class, all-the-while failing to distinguish between prior members of the Union who were previously entitled to the Additional Contribution—which is the case here—vis-à-vis other non-members of the Union who never received these benefits. Id. at ¶ 115.

As will be argued below, Section 1983 is inapplicable hereto, and the Complaint against the Union should be dismissed forthwith. Additionally, Plaintiffs failed to comply with Rule 23's requirements, and their request for class certification should likewise be dismissed.

III. ARGUMENT

a. Plaintiffs have failed to adequately plea a cause of action under Section 1983.

i. Applicable Pleading Standard

When analyzing a 12(b)(6) motion to dismiss, the court must consider all well-pleaded allegations contained in the complaint. However, the Court cannot consider outside evidence or facts not alleged in the pleadings. See Fleming v. Lind-Waldock & Co., 922 F.2d 20 (1st Cir. 1990). Thus, the sole inquiry under Rule 12(b)(6) is whether construing the well-pleaded facts of the complaint in the light most favorable to plaintiffs, the complaint states a claim for which relief can be granted. Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 7 (1st Cir. 2011).

The failure to make sufficient allegations, either direct or inferential, regarding each material element supporting a claim warrants dismissal of the complaint. Conley v. Gibson, 355 U.S. 41, 45-48 (1957); Rullán v. Council of Co-Owners of McKinley Ct. Condominium, 899 F. Supp. 857, 859 (D.P.R. 1995). Thus, a complaint must set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988). Hence, courts "will not accept a complainants'

unsupported conclusions or interpretations of law." Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d. 962, 971 (1st Cir. 1993).

When judging the sufficiency of a complaint, courts must "differentiate between well-pleaded facts, on the one hand, and 'bald assertions, unsupportable conclusions, periphrastic circumlocution, and the like' because the former must be credited, but the latter can safely be ignored." LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (quoting Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir.1996)).

The factual allegations must be such that they "raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). This entails that the complaint must have enough factual matter that, if accepted as true, states "a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 570). Simply put, the plaintiff must plead enough facts with which the court may infer "that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 679 (quoting Twombly, 550 U.S. at 570).

To state a claim under 42 U.S.C. § 1983, a plaintiff must establish that he or she was (a) deprived of a right secured by the Constitution or laws of the United States, and (b) that the alleged deprivation was committed under color of state law. Alexis v. McDonald's Restaurants of Mass., 67 F.3d 341, 351 (1st Cir. 1995) (citing Casa Marie, Inc. v. Superior Court of P.R., 988 F.2d 252, 258-59 (1st Cir. 1993)).

Like the state-action requirement of the Fourteenth Amendment of the United States Constitution, the under-color-of-state-law element of Section 1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful.'" Am.

Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50, (1999) (citing Blum v. Yaretsky, 457 U.S. 991, 1002, (1982)). That is, actions of individuals who are not state actors need to be regarded as state action for purposes of establishing liability under Section 1983. In determining whether a private entity's act is undertaken under color of law, one must not solely consider if such individual, person or entity is serving a public function but if such is a function traditionally the exclusive prerogative of the state. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

ii. Plaintiffs have failed to plead any facts that would permit the Court to conclude that the Union is liable under Section 1983.

In addition to the aforementioned elements for a Section 1983, plaintiffs are beholden to additional requirements when stating a claim for retaliation under the First Amendment. Plaintiffs are also required to show that (a) they engaged in constitutionally protected conduct, and (b) this conduct was a substantial factor or a motivating factor for the defendant's retaliatory decision. Pierce v. Cotuit Fire Dist., 741 F.3d 295, 302-03 (1st Cir. 2014); Centro Médico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 10 (1st Cir. 2005).

To comply with the first prong of this inquiry, the plaintiff must allege that he or she was acting "as a citizen on a matter of public concern." Díaz-Bigio v. Santini, 652 F.3d 45, 51 (1st Cir. 2011) (citing Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)). If the plaintiff's speech is not on a matter of public concern, there is no First Amendment cause of action. Id. at 51. The plaintiff must also show that the First Amendment protection of the speech

must outweigh the government's interest as an employer. Rivera-Jiménez v. Pierluisi, 362 F.3d 87, 94 (1st Cir. 2004).

To meet the second prong, the plaintiff must demonstrate "that his constitutionally protected conduct was the driving factor that caused the retaliation." Díaz-Bigio, 652 F. 3d at 51. The plaintiff's burden in establishing motivation "is more substantial than the burden of producing prima facie evidence in, for example, the first stage of a Title VII discrimination case." Id. at n.3 (citing Guilloty Pérez v. Pierluisi, 339 F.3d 43, 56 n.11 (1st Cir. 2003)). All this said, the First Circuit has emphasized that the First Amendment does not create a constitutional revision process for every government employment decision. See Rojas-Velázquez v. Figueroa-Sancha, 676 F.3d 206, 210 (1st Cir. 2012).

In this case, Plaintiffs have failed to comply with the first prong. Plaintiffs make a conclusory allegation that the Union violated its rights under the First and Fourteenth Amendments.[5] However, the facts in this case do not support any such conclusion. The alleged disparity between Plaintiffs and other employees does not stem from any party's exercise of rights, but on whether the Additional Contribution provided by the CBA—negotiated by the Union at a time when the government could compel payment of agency fees from all employees—continue to apply to employees who have left the Union and

[5] Plaintiffs do state that their Fourteenth Amendment claim is premised solely on the fact that it incorporates the First Amendment to the States. **ECF No. 22**, p. 23 § B. The Supreme Court has never held whether Puerto Rico is a "State" for purposes of the Fourteenth Amendment. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974) (holding it to be unnecessary to determine whether the Due Process Clause applied to Puerto Rico under the Fifth or the Fourteenth Amendment). Notwithstanding, for purposes of this Motion, the Union does not contest whether the First Amendment applies to Puerto Rico as a State or as an instrumentality of the Federal Government. Indeed, Plaintiffs' Section 1983 claim fails regardless of this distinction, as explained herein.

who ceased to pay agency fees to the Union. In other words, there is no protected speech here at issue.

The Supreme Court speculated through *dicta* in Janus that this conduct may amount to an equal protection claim, without addressing the matter on the merits. 138 S. Ct. at 2468 (quoting Steel v. Louisville & Nashville R.R. Co., 323 U.S. 192, 198-99 (1944)). And in doing so, the Supreme Court intimated that the matters at issue here are not governed by the First Amendment and, hence, Plaintiffs cannot state a Section 1983 claim premised thereon.

But more important is the fact that Section 1983 is generally directed to safeguard against abuses by public entities, i.e., those acting "under color of law." For a private entity to have acted under color of law, i.e., to be held liable under Section 1983, its "actions must be fairly attributable to the State". Estades-Negroni v. CPC Hosp. San Juan Capestrano, 412 F.3d 1, 4 (1st Cir. 2005) (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982). A private party can only be deemed a state actor for Section 1983 purposes if one of three tests is met. Estades-Negroni, 412 F.3d at 4-5.

The first test is the compulsion test. Under this test, "a private party is fairly characterized as a state actor when the state 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [challenged conduct] must in law be deemed to be that of the State.'" Id. at 5 (alteration in the original) (quoting Blum v. Yarestky, 457 U.S. 991, 1004 (1982)). The second test—the nexus/joint action test—deems a private party a state actor "where an examination of the totality of the circumstances reveals that the state has 'so far insinuated itself into a position of

interdependence with the [private party] that it was a joint participant in [the challenged activity].'" Estades-Negroni, 412 F.3d at 5. (alterations in the original) (quoting Bass v. Parkwood Hosp., 180 F.3d 234, 242 (5th Cir. 1999)). Finally, under the public function test, "a private party is viewed as a state actor if the plaintiff establishes that, in engaging in the challenged conduct, the private party performed a public function that has been 'traditionally the exclusive prerogative of the State.'" Estades-Negroni, 412 F.3d at 5. (quoting Blum, 457 U.S. at 1005).

Plaintiffs fail to muster any allegations as to which of the three tests apply. The most Plaintiffs do is allege that the Union requested that the Bureau strip them of the Additional Contribution, and the Bureau complied with this request and took the corresponding action. However, Plaintiffs at no point state how this constitutes state action by the Union. That should be reason enough for the Court to deem their theory of liability waived. See, e.g., United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (denoting that "judges are not expected to be mindreaders" and instructing litigants to spell out their arguments "squarely and distinctly" or else forever hold their peace).

Regardless, the Ninth Circuit has held that, when a state and a Union act in accordance with their understanding of the terms of a CBA—particularly provisions relating to dues checkoffs—they are simply "enforc[ing] a private agreement." Belgau v. Inslee, 975 F.3d 940, 949 (9th Cir. 2020). And such conduct, as a matter of law, does not constitute state action. Id. (quoting Roberts v. AT&T Mobility LLC, 877 F.3d 833, 844 (9th Cir. 2017).

And the same holding should follow here. Any action by the Bureau to cease providing Plaintiffs with the Additional Contribution stems from its understanding of the CBA, which is the operative document. Indeed, Plaintiffs' allegations of "state action" are simply a thinly veiled breach of contract claim, where the only additional curiosity is the state government's participation in the agreement. Thus, there is no state action here, but rather the government itself acting as a private actor.

Moreover, even if the Union were involved in a state action—which is not the case—Plaintiffs have failed to adequately plead that the Union's involvement was the proximate cause of their alleged injuries.

Proximate cause means there must be "some direct relation between the injury asserted and the injurious conduct alleged." CSX Transp., Inc. v. McBride, 564 U.S. 685, 707 (2011) (citing Holmes v. Secs. Inv. Protection Corp., 503 U.S. 258, 268 (1992). However, "indirect" acts are excluded from the scope of liability. CSX Transp., Inc., 564 U.S. at 707. Indeed, liability must not attach to "every conceivable harm that can be traced to alleged wrongdoing." Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983).

To impose liability on a private actor for a Section 1983 claim, the plaintiff must establish that the private individual was the proximate cause of the violations. Franklin v. Fox, 312 F.3d 423, 445 (9th Cir. 2002) (citing King v. Massarweh, 782 F.2d 825, 829 (9th Cir. 1986). The plaintiff must show that the private actor had some degree of control over state officials' decision to commit the challenged act. Id. at 445. In absence thereof, a court

of law can only conclude that the private actor did not proximately cause the injuries stemming from the act. Id. at 446.

And Plaintiffs' allegations fail to prove that any intervention by the Union was the proximate cause of their alleged damages. Plaintiffs state that the Union "asked" the Bureau to stop providing them with the Additional Contribution. **ECF No. 22**, ¶ 31. However, there are no allegations in the Complaint that the Union exercised any degree of control over the Bureau's actions. Instead, the Complaint portrays the Bureau as the ultimate decisionmaker. Thus, any intervention by the Union cannot be considered the proximate cause of any of the alleged injuries.

Plaintiffs failed to precise a protected activity in which they participated. Plaintiffs also failed to allege any state action. And lastly, Plaintiffs made no showing that the Union's alleged conduct was the proximate cause of their alleged injuries. Each of these failures warrants dismissal of their Section 1983 claim against the Union.

iii. The Union is entitled to qualified immunity.

Were the Court to determine that the Union is a "state actor" for purposes of Section 1983, Plaintiffs' claims against it would otherwise fail, as the Union would be entitled to qualified immunity. Qualified immunity "does not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." Filarsky v. Delia, 566 U.S., 377, 389 (2012). Thus, to the extent that a private actor acts on behalf of the government, the private actor is also afforded qualified immunity. Id. at 390. Similarly, when a private actor works jointly with the government on some task for which the government would be afforded immunity, there

is no reason to distinguish between either actor and strip the private actor from the benefits afforded to his or her government analogue. Id. at 393-94.

Qualified immunity bars suits against persons under color if law unless (a) they violated a federal statutory or constitutional right, and (b) the unlawfulness of their behavior was "clearly established" at the time. District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018). "Clearly established" requires that the rule in question be "settled law." Hunter v. Bryant, 502 U. S. 224, 228 (1991) (per curiam). Settled law, in turn, is either "controlling authority" or "a robust 'consensus of cases of persuasive authority.'" Ashcroft v. al-Kidd, 563 U.S. 731, 741-42 (2011).

This settled rule must be such that "every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Wesby, 138 S. Ct. at 590 (citing Reichle v. Howards, 566 U.S. 658, 666 (2012). And this settled rule is on a case-by-case basis, hinging on the specifics of each case. The law must be sufficiently clear that it makes a reasonable officer aware that his or her "conduct was unlawful ***in the situation he confronted***." Saucier v. Katz, 533 U.S. 194, 2020 (2001) (emphasis added). This requires a high "degree of specificity," and expressly eschews higher levels of generality. Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) cf., Plumhoff v. Rickard, 572 U.S. 765, 779 (2014).

In this case, the law has not been "clearly established." Instead, the same case law on which Plaintiffs premise their claims—Janus—expressly recognizes that the issue here has not been clearly resolved in their favor.

The issue here is whether a union and a public-sector employer may enter into a collective bargaining agreement with more favorable terms for union members vis-à-vis

non-union members who refuse to pay agency fees. On that note, the Supreme Court stated in *dicta* in Janus that "it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers." Janus, 138 S. Ct. at 2468. More importantly, courts nationwide have refused to extend Janus past its initial proposition that a government may not compel its employees to pay agency fees. Belgau, 975 F.3d. at 951-952 (9th Cir. 2020) ("Janus does not extend a First Amendment right to avoid paying union dues."); Creed v. Alaska State Employees Ass'n, 472 F. Supp. 3d. 518, 526 (D. Alaska 2020) ("The animating principle of Janus was not that the payment of union dues violates the First Amendment, but rather that ***compelling*** non-union members to support a union by paying fees violates the First Amendment.") (emphasis in the original); Reisman v. Associated Faculties of the Univ. of Me., 356 F. Supp. 3d 173, 177 (D. Me. 2018) ("Janus did not [. . .] call into question [. . .] that the First Amendment is not violated where a democratically selected union serves as the exclusive bargaining agent for all employees").

The aforementioned case law shows that the law has not been clearly established for the specific allegations of unlawfulness brought by Plaintiffs against the Union. Therefore, the Union should be entitled to qualified immunity.

b. All but three (3) plaintiffs' claims are time-barred.

Section 1983 claims are subject to the forum state's statute of limitations period for tort actions. Colón-Rivera v. Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatoria, 665 F. Supp. 2d 88, 93 (D.P.R. 2009) (citing González-

Álvarez v. Rivero-Cubano, 426 F.3d 422, 425 (1st Cir. 2005)). Under both the 1930 and 2020 Civil Codes, the statute of limitations applicable to tort claims is one (1) year. P.R. Laws Ann. tit. 31, §§ 5298 & 9496. Thus, the statute of limitations for Section 1983 claims brought within this District is one (1) year. Ramos-Borges v. Puerto Rico, 740 F. Supp. 2d 262, 274 (D.P.R. 2010) (citing Centro Médico del Turabo, Inc., 406 F.3d at 6).

The limitations period beings to accrue ""when the plaintiff knows or has reason to know of the injury which is the basis for the claim." Rodriguez-Garcia v. Municipality of Caguas, 354 F.3d 91, 96-97 (1st Cir. 2004). Here, all plaintiffs knew of their claims, when the Commonwealth allegedly took the decision to no longer pay them the Additional Contribution. However, all but three (3) Plaintiffs filed their claims more than a year after the applicable statute of limitations:[6]

- Carbonell alleged to have stopped receiving the Additional Contribution on or around July 2018. **ECF No. 22**, ¶¶ 45-46. However, she filed her Complaint on May 24, 2022, after almost four years had elapsed. **ECF No. 1**.

- Whatts also alleges to have been stripped of the Additional Contribution on or around July 2018. **ECF No. 22**, ¶¶ 51-52. As with Carbonell, he filed suit nearly four years later, on May 24, 2022. **ECF No. 1**.

- Colón alleges to have been subjected to the same practice on or around November to December 2020. **ECF No. 22**, ¶¶ 56-57. However, Colón filed the Complaint on May 24, 2022, more than a year-and-half thereafter. **ECF No. 1**.

- Nieves also claims that he stopped receiving the Additional Contribution on or around June 27, 2018, **ECF No. 22**, ¶¶ 61-62. However, Nieves did not act until the May 24, 2022 Complaint. **ECF No. 1**.

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[6] The only plaintiffs who arguably filed their claims against the Union within the statute of limitations are Berlingeri, Cruz, and Ortiz Rivera. The relevant events in their cases occurred on or around October 2021. **ECF No. 22**, ¶¶ 86-87, 92-93, & 97-98. However, as argued in section III(c) hereof, they still failed to file an internal complaint within the fifteen-working-day timeframe set forth by the CBA's exclusive grievance procedure or to comply with any other portion thereof.

- Álvarez avers to have been stripped of the Additional Contribution on or around October 2020. **ECF No. 22**, ¶¶ 66-67. However, her Complaint is dated May 24, 2022. **ECF No. 1**.

- Dumont allegedly suffered her injury-in-fact sometime in July 2018. **ECF No. 22**, ¶¶ 71-72. However, she did not file a complaint until May 24, 2022. **ECF No. 1**.

- Quiñones claims to have had her rights violated on or around July 2019. **ECF No. 22**, ¶¶ 76-77. Notwithstanding, she delayed until May 24, 2022 to file her Complaint. **ECF No. 1**.

- Ortiz-González also claims to have had her Additional Contribution removed on or around July 2018. **ECF No. 22**, ¶¶ 81-82. As with the six (6) preceding plaintiffs, she did not file her Complaint until May 24, 2022. **ECF No. 1**.

Plaintiffs try to get around the statute of limitations, by alleging that they are entitled to payment of sums "improperly withheld [. . .] within the appropriate 1-year statute of limitations period." **ECF No. 22**, p. 23 § D. In other words, Plaintiffs are pleading a continuing violation. However, the continuing violation doctrine is inapplicable to their claims, since they are not premised on an alleged continuous failure to pay amounts owed, but on an alleged one-time decision to strip them of the Additional Contribution. Thus, the continuing violation doctrine does not serve to resurrect claims which manifestly fall outside the statute of limitations.

The continuing violation doctrine "does not apply to 'discrete acts' of alleged discrimination that occur on a 'particular day.'" Ayala v. Shinseki, 780 F.3d 52, 57 (1st Cir. 2015) (quoting Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130 (1st Cir. 2009)). This Court has held on prior occasions that the termination of benefits constitutes a discrete act. Arroyo-Audifred v. Verizon Wireless, Inc., 431 F. Supp. 2d 215, 220 (D.P.R. 2006);

Acevedo v. United Parcel Serv., Inc., No. 02-2704(SEC), 2005 U.S. Dist. LEXIS 52539, at *10 (D.P.R. Nov. 30, 2005). And the First Circuit has as well. See Cham v. Station Operators, Inc., 685 F.3d 87, 94 (1st Cir. 2012) ("An adverse employment action typically involves discrete changes in the terms of employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, ***or a decision causing significant change in benefits***.") (internal quotation marks omitted) (emphasis added). Because Plaintiffs' claims arise from one alleged discrete act: the decision to strip them of the Additional Contribution, they cannot benefit from the continuing violation doctrine.

c. The CBA includes contractual remedies, which Plaintiffs failed to exhaust.

Where relevant, Article 49 of the CBA provides a procedure for the resolution of complaints and grievances, and binding arbitration. Section 2.1 of Article 49 defines complaints and grievances as "any controversy, dispute or claim that an employee, the Union, or the [Bureau] may have that pertains to the interpretation, application, definition, or breach of its rights in light of the applicable laws and/or regulations of the [Bureau] and the Commonwealth of Puerto Rico." **Exhibit A**, Art. 49, § 2.1.

Pursuant to Section 3 of Article 49, the Union or any employee aggrieved by any action by the Bureau must file a complaint in writing within fifteen working days after the relevant facts. Id. at Art. 49, § 3. Thereafter, this Complaint is governed by a 4-step procedure, which culminates with arbitration before the Puerto Rico Commission of Labor Relations for the Public Service. Id. at Art. 49, § 4. Section 6.1 of Article 49 unmistakably states that this procedure "shall be the exclusive procedure for the

processing of all complaints that arise in the workplace." Id. at Art. 49, § 6.1. Section 6.2 further provides that "all members of the Appropriate Unit, ***including the unaffiliated***, are required to use this procedure." Id. at Art. 49, § 6.2 (emphasis added).

Notwithstanding its exclusivity, none of the Plaintiffs followed Article 49's procedure.[7] Instead, they all filed the Complaint of caption, without any allegation as to their failure to comply with the CBA. That proves fatal to their case and warrants dismissal of the Complaint.

In these kinds of cases, "[f]ull exhaustion is required unless 'any of the exceptions to the general rule of exhaustion' apply." Davison v. Town of Sandwich, Civil Action No. 15-11889-FDS, 2017 U.S. Dist. LEXIS 93018, at *5 (D. Mass. June 16, 2017) (quoting Hayes v. New England Millwork Distrib., Inc., 602 F.2d 15, 18 (1st Cir. 1979)). Thus, generally, a plaintiff's failure to exhaust the remedies provided by a CBA, "bars his resort to this Court." Mills v. United States Postal Serv., 977 F. Supp. 116, 122 (D.R.I. 1997) (citing Vaca v. Sipes, 386 U.S. 171, 185 (1966)). A plaintiff's failure is only excused if he or she can prove the following exceptions: (1) the employer repudiated the CBA's procedures; (2) resorting to arbitration would be futile, or (3) the Union's breach of an obligation to the concerned employee ***prevented him or her from exhausting those remedies***. See respectively, Vaca, 386 U.S. at 185; Glover v. St. Louis-San Francisco Rwy., 393 U.S. 324, 331 (1969); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 295 (1st Cir. 1978).

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[7] At most, there is an allegation that Carbonell wrote to the Bureau requesting that the benefit be reinstated in her case. **ECF No. 22, ¶ 47**. However, Carbonell did so only in March 2022, nearly four (4) years after allegedly being stripped of the benefit, which is well outside the fifteen-working-day term provided by Article 49.

None of these exceptions apply here. First, the Complaint contains no allegations that the Bureau repudiated Article 49's procedures. Second, the Complaint omits any claims of futility.[8] Third, there is no allegation that the Union impaired Plaintiffs' exercise of their rights. Nor could it do so either. By its terms, Section 3 of Article 49 provides aggrieved employees with the option of filing their complaints individually. Thus, the Union's breach or failure to comply with any obligation it may have towards Plaintiffs would not impede them from engaging in the relevant procedures.

More importantly, Plaintiffs cannot rely on Section 1983 or the First Amendment to sidestep these contractual prerequisites. The Supreme Court has enunciated that "if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted." Lingle Norge Div. of Magic Chef, 486 U.S. 399, 408 n. 7 (1988). Because the benefit at issue here is one provided by the CBA, the question of whether Plaintiffs are entitled thereto requires an interpretation of the CBA, and, consequently, strict adherence to the procedures provided therein.

In sum, the parties hereto had contractually agreed to an exclusive procedure to resolve disputes. Plaintiffs failed to comply with that procedure, and they failed to allege any reason for the Court to excuse their failure to comply therewith. Faced with this quandary, the Court should rule that Plaintiffs failed to exhaust their contractual remedies and dismiss the Complaint with prejudice.

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[8] Carbonell's communication with the Bureau, discussed in the preceding footnote, belies all allegations of futility.

d. Plaintiffs failed to plead sufficient facts to be certified as a class.

Plaintiffs seek leave to bring this action on behalf of a class, pursuant to Fed. R. Civ. P. 23. They define the putative class as "all individuals who, at any time on or after May 24, 2021: (a) were employed by the PRPB and exclusively represented by the Union, (b) were not Union members and (c) were not granted the $25 monthly additional employer contribution." **ECF No. 86**, ¶ 110. Nonetheless, Plaintiffs have failed to comply with the numerosity and typicality requirements of Fed. R. Civ. P. 23(a).

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." While there is no strict minimum number of plaintiffs required to demonstrate impracticability, there is a general presumption that "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." García-Rubiera v. Calderón, 570 F.3d 443, 460 (1st Cir. 2009) (quoting Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)).

Here, Plaintiffs have failed to proffer any allegations that would demonstrate numerosity. Instead, eight (8) of the eleven (11) Plaintiffs have stated claims that, even if otherwise legally-sound, are time-barred. And Plaintiffs have failed to make any other allegation as to whether there are any other employees within the proposed class with similar claims that fall within the statute of limitations. Given Plaintiff's failure to do so, their request for class certification should be denied without further consideration.

Regarding the typicality requirement, this is met where "the class representatives' claims have the same essential characteristics as the claims of the other members of the class." Walker v. Osterman Propane LLC, 411 F. Supp. 3d 100, 111 (D. Mass. 2019)

(quoting García v. E.J. Amusements of N.H., Inc., 98 F. Supp. 3d 277, 288 (D. Mass. 2015)). Plaintiffs' claims, however, do not have the "same essential characteristics" of the putative class.

To wit, Plaintiffs intend to represent all non-Union members who were not granted the Additional Contribution. However, Plaintiffs' claims, by their allegations, are not based by their being non-Union members, but by allegedly having been Union members, then disaffiliating from the Union and, as their Complaint reads, being stripped of their benefit on account of their disaffiliation. Thus, their claims are not "essentially the same" as those of the putative class. That being the case, they also fail to comply with the typicality requirement.

e. Plaintiffs' "air-conditioner claim" is without basis.

In paragraph 107 of the Complaint, Plaintiffs allege that they were subjected to acts of coercion to join the Union relating to a malfunctioning air conditioner. **ECF No. 22**, ¶ 107. Specifically, the air conditioner in Carbonell's, Whatt's, and Nieves' work area went out of service for approximately one month. Id. These plaintiffs' immediate supervisor forced them to remain working for the full workday, while allowing Union members to leave work early. Id.

As argued in Section III(a) hereof, Section 1983's case law requires Plaintiffs to present sufficient allegations from which the Court may determine the Union's involvement to be a proximate cause of any claim arising thereunder. However, Plaintiffs have failed to proffer any allegations demonstrating that the Union somehow

participated in the "air conditioner claim" to their detriment. Instead, the only actor appears to be their immediate supervisor.

Moreover, and pursuant to the arguments in Section III(c) of this Motion, Plaintiffs' air conditioner claim would also be covered by the CBA's exclusive dispute resolution procedures. Notwithstanding, they also failed to comply therewith with regards to their "air conditioner claim."

Both matters being the case, the Court should also dismiss the "air conditioner claim" against the Union.

IV. CONCLUSION

Plaintiffs have failed to state a tenable claim under Section 1983. For starters, their claims of breach of First Amendment are a thinly veiled breach of contract claim, which makes any claims of infringement inapplicable. On that same note, Plaintiffs have failed to adequately plead that the Union—a private actor—became a state actor for purposes of Section 1983, nor did they furnish the Court with sufficient allegations for it to infer that the Union's acts were the proximate cause of their alleged injuries. And even if that were the case, the matter here at issue is not "clearly established" law, which means that the Union should be entitled to qualified immunity.

And even if the Court were to find that Plaintiffs stated plausible claims under Section 1983, other considerations bar them from recovering. First, eight (8) of the eleven (11) Plaintiffs' claims are time-barred. Second, the same instrument which provides for the benefit here at issue has contractual remedies which Plaintiffs were required to exhaust, but did not do so.

Lastly, Plaintiffs have also failed to comply with the procedural requirements to be certified as a class. They failed to state any facts to comply with Rule 23's numerosity requirement and their claims are not typical to the putative class.

WHEREFORE, the Union respectfully asks the Court to dismiss the Complaint against it with prejudice.

RESPECTFULLY SUBMITTED, in Guaynabo, Puerto Rico, this 16th day of September 2022.

CERTIFICATE OF SERVICE: The undersigned certify having filed this document with the Clerk of the Court's CM/ECF system, which will automatically serve all counsel of record with a true and faithful copy hereof.

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