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

VANESSA E. CARBONELL*, et. al.* ***Plaintiffs,*** **v.** **ANTONIO LÓPEZ FIGUEROA*, et al*.** ***Defendants.***	**CIVIL NO. 22-1236 (WGY)** **Class Action Complaint/** **Constitutional Violation**

REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION AT DOCKET NO. 55

TO THE HONORABLE COURT:

COMES NOW, the Department of Justice of the Commonwealth of Puerto Rico, on behalf of **Antonio López Figueroa**, in his official capacity as Commissioner of the Puerto Rico Police Bureau (hereinafter "PRPB"), and **Jojanie Mulero Andino**, in her official capacity as Human Resources Director of the PRPB, represented by the undersigned counsel and respectfully state and pray as follows:

I. INTRODUCTION

On September 16, 2022, appearing Co-Defendants moved to dismiss the amended complaint, a request which Plaintiffs opposed. (Docket Nos. 32 & 55). Appearing Co-Defendants then moved to reply to Plaintiffs' opposition (Docket No. 60), and hereby submit their arguments in support.

Plaintiffs sought to oppose the legal arguments for dismissal claiming that their allegations actually support their First Amendment claims under *Janus v. AFSCME Council*, 138 S.Ct. 2448 (2018) per the motion to dismiss standard and that appearing Co-Defendants' conduct amounts to retaliation. Plaintiffs also attempted to extend the date of accrual by invoking the separate accrual

rule, the discovery rule, and the continuing violation doctrine. (Docket No. 55, p.10). But still, appearing Co-Defendants, reply and move to dismiss the Amended Complaint with prejudice because: (A) Plaintiffs' arguments are *de facto* amendments to their Amended Complaint, finding no support in *Janus*; and (B) they have failed to plausibly allege continuous violations and their claims were untimely filed pursuant to the applicable statute of limitations in actions brought pursuant to 42 U.S.C. §1983.

II. DISCUSSION

A. Defendants alleged retaliatory actions for the first time in their Response; should they have been alleged in the operative complaint, they are nonetheless unsupported by *Janus*.

Plaintiffs claimed in their response that "[t]his case is about *retaliation* that occurred directly because of Plaintiffs' and class members' specific exercise of their *Janus* First Amendment rights of non-association with the Union." (Docket No. 55 at 5) (emphasis added). Plaintiffs nowhere mentioned or referred to the concept of retaliation in the Amended Complaint. Therefore, in raising this argument, Plaintiffs are not proffering arguments against dismissal, but setting forth causes of action different from the ones described in their Complaint and Amended Complaint. Such attempt should be rejected by this Court as insufficient to stand against the dismissal of the Amended Complaint.

In First Amendment litigation, "retaliation" is a very specific claim with very specific elements. Retaliation is an intentional act in response to the nature of a complaint. *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 174 (2005). Discrimination is a *broader* term that covers a wide range of intentional unequal and differential treatment. *Jackson*, at 174-175. Retaliation is a form of discrimination, specifically described in employment discrimination statutes such as Title VII and Title IX of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a)et

seq. *Jackson*, at 174-175. "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim. *Ibid.* (citing *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283–284, (1977)); *Nieves v. Bartlett*, __U.S.__, 139 S.Ct.1715, 1722 (2019).

For a plaintiff to prevail on such a claim, he must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." *Hartman*, 547 U.S. at 259. It is clearly insufficient to demonstrate that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must be the cause of the injury. *Nieves*, at 1722. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive. *Hartman*, 547 U.S. at 260 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

Instead of retaliation, what Plaintiffs proffered in their Amended Complaint was a *discrimination* claim. *See* Docket No. 22 at 5, ¶¶ 21 & 22. Defendants moved for dismissal arguing that these allegations fail to state a discrimination claim. (Docket No. 32). By invoking *retaliation* in their opposition, Plaintiffs are impermissibly extending their claims beyond their original pleadings, turning them through the magic of legal alchemy into a different, more specific cause of action not mentioned in their original pleadings. This is a not so tacit admission that their

original *discrimination* claims fail to state a cause of action, an outcome they can only avoid through a furtive amendment to their allegations. Their *retaliation* arguments should therefore be rejected, and their *discrimination* claims dismissed as failing to state a proper claim deserving legal relief.[1]

Plaintiffs referred in their opposition to their *Janus*-based "First Amendment rights of non-association with the Union," relying on a reading of that case not supported by its text nor by subsequent case law for the survival of their causes of action. (Docket No. 55 at 5). As appearing Co-Defendants stated in the Motion to Dismiss at Docket No. 32 p. 12-16, the ruling in *Janus* is limited to the constitutionality of agency-fees and has not been extended to terms and conditions of employment other than that specific one. *See Belgau v. Inslee*, 975 F.3d. 940, 951-952 (9th Cir. 2020) (*Janus* does not extend a First Amendment right to avoid paying union dues, nor does it create a free speech waiver requirement for union members before dues are deducted pursuant to a voluntary agreement); *Creed v. Alaska State Employees Association*, 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 than compelling non-union members to support a union by paying fees violates the First Amendment"); *Durst v. Oregon Education Association*, 450 F.Supp.3d 1085, 1091 (D. Or. 2020)("Janus is inapplicable to situations where an employee chooses to join a union, authorizes dues deductions over an entire...year, receives union benefits not available to nonmembers, and then later attempts to cancel deductions outside of the opt-out period they earlier agreed to"); *Reisman v. Associated Faculties of University of Maine*, 356 F.Supp.3d 173, 177 (D. Maine 2018)("Janus did not…call into question…that the First

[1] To the extent it fails to sufficiently allege the existence of a link between Defendants' "retaliatory animus" and Plaintiffs' "subsequent injury," Plaintiffs' *retaliation* claim also fails to state a claim under the legal standards described in this filing and should be dismissed.

Amendment is not violated where a democratically selected union serves as the exclusive bargaining agent for all employees").

Nor does *Janus* provide "an unqualified constitutional right to accept the benefits of union representation without paying." *Bennett v. Council 31 of Am. Fed'n of State, Cnty. & Municipal Emps., AFL-CIO,* 991 F.3d 724, 733 (7th Cir. 2021) citing at *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31* ("*Janus II*"), 942 F.3d 352, 358 (7th Cir. 2019). In summary, "[t]he only right ... recognized is that of an objector not to pay *any* union fees." *Id.* Accordingly, "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Janus*, 138 S. Ct. at 2485 n.27.[2]

In conclusion, Plaintiffs' "*Janus* First Amendment rights" as described in their opposition rely on an interpretation of this precedent not supported by its text nor by subsequent case law. To the extent their "*Janus* First Amendment rights" lack textual and doctrinal support for their claims of compelled speech and association, the "strict scrutiny" standard of review they invoked in their filing and the alleged need by Co-Defendants to invoke a "compelling interest" to justify their actions (Docket No. 55 at 9-10) are not relevant to their argument and should not stand in the way of the dismissal of their claims. They claimed Defendants' conduct is "inherently conducive to" and that it "encourages union membership" (Docket No. 55 at 8), failing to cite applicable case law equating such encouragement with unconstitutional coercion, and failing to explain how *Janus's* prohibitions extend so far as to ban any kind of encouragement other than compulsory deduction of agency fees. Their arguments lack merit and do not support the proposition that their Amended Complaint stated an adequate claim under current legal doctrines. Accordingly, the

[2] These references, as well as those in the previous paragraph, while somewhat repetitive (they were included in Co-Defendants' prior filings), become relevant to our argument in this motion to the extent Plaintiffs argue in their opposition that the *Janus* ruling supports relief beyond the mere collection of agency fees.

Amended Complaint must be dismissed.

B. Plaintiff's claims are time-barred pursuant to the applicable statute of limitations in actions brought pursuant to 42 U.S.C. §1983.

Plaintiffs attempt to extend the date of accrual of their claims by invoking the separate accrual rule, the discovery rule, and the continuing violation doctrine in an effort to keep their cause of action alive. (Docket No. 55, p.10). In sum, they argued for first time in their response, that each bi-weekly withholding of the additional employer contribution is a separate or independent violation that accrues separately, and that the discovery rule and the continuing violation doctrine applied as exceptions to extend Plaintiffs' date of accrual. Nonetheless, these doctrines do not apply in setting or extending Plaintiffs' date of accrual, and their arguments therefore fail in their purported objective.

The separate accrual rule is similar to the continuing violation doctrine and is mostly applied in Copyright and RICO claims.[3] *See, Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 180–81 (1997) ("[T]he 'separate accrual' civil RICO rule adopted by some Circuits […] is similar to the 'continuing violation' doctrine in antitrust, in that the commission of a separate, new predicate act within the 4–year limitations period permits a plaintiff to recover for the additional damages that act caused."). Under this rule, "however, the plaintiff cannot use an independent, new act as a bootstrap to recover for injuries caused by other predicate acts that took place outside the limitations period." *Id.* Also, "[i]t is widely recognized that the separate-accrual rule attends the copyright statute of limitations." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014). Attending the separate accrual rule under the copy right statute of limitations, "when a

[3] At footnote 7 of Plaintiffs' response (Docket No. 55, p.11), they argued that courts have applied the separate accrual rule in various kind of cases, but all their references are exclusively of RICO and Copyright claims, which are inapplicable to the instant case.

defendant commits successive violations, the statute of limitations runs separately from each violation." *Id.* "In short, each infringing act starts a new limitations period". *Id.*

This rule has not been formally adopted in the First Circuit in contexts other than RICO and Copyright claims. *See Home Orthopedics Corp. v. Rodriguez* (D.P.R. May 21, 2012), *report and recommendation adopted as modified sub nom. Home Orthopedics, Inc. v. Rodríguez* (D.P.R. Sept. 30, 2012), *aff'd sub nom. Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521 (1st Cir. 2015) ("The First Circuit has never applied the separate accrual rule"). Also, it is worth noting that "[s]eparately accruing harm should not be confused with harm from past violations that are continuing." *Petrella*, 572 U.S. 671, comparing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (for separately accruing harm, each new act must cause "harm [to the plaintiff] over and above the harm that the earlier acts caused"), with *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–381 (1982) ("[W]here a plaintiff ... challenges ... an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period, measured from] the last asserted occurrence of that practice").

Here, Plaintiffs argued that this Court should apply the separate accrual rule as the District of S.D. California did in *Brannian v. City of San Diego*, 364 F. Supp. 2d 1187 (S.D. Cal. 2005). (Docket No. 55, p. 11). But *Brannian* presents a different scenario from Plaintiffs untimely challenge because they failed to allege that their allegations are about independent and periodical violations. As a result, Plaintiffs cannot claim that every paycheck withholding amounts to a new wrong that should be considered collectively to set the date of accrual. Each time that Plaintiffs received a pay roll that reflected the $25 withholding of the additional employer healthcare contribution was not a new discriminatory event. Instead, it is a consequence of one unique and

only event that started the runoff for the filing of the Complaint. Accordingly, the separate accrual rule does not apply to the events of the instant case.

Next, Plaintiffs alternatively argued that this Court should apply the discovery rule. This rule tolls the statute of limitations until a Plaintiff knew or reasonably should have known the injury that forms the basis for the claim. *See Romero v. Allstate Corp.*, 404 F.3d 212, 222 (3d Cir. 2005) ("Typically in a federal question case, and in the absence of any contrary directive from Congress, courts employ the federal `discovery rule' to determine when the federal claim accrues for limitations purposes."). Accordingly, Plaintiffs purport to bring new allegations in their response in an attempt to remediate their failure to timely file their claims by arguing that they discovered the discriminatory and unlawful reason of the deduction of the employer healthcare contribution within a year before the filing of the complaint.[4]

However, Plaintiffs admitted in their Amended Complaint that in effect they had knowledge since 2018, about the withholding of the $25 additional employer healthcare contribution. (Docket No. 22, p.4, ¶11). Thus, Plaintiffs are not entitled to the application of the discovery rule, their claims are not tolled, and they have filed untimely claims that should be dismissed.

[4] In their Response, Plaintiffs submitted a document including information extraneous to the original facts pleaded in the Amended Complaint. (Docket No. 55-1). In determining the sufficiency of the Amended Complaint, the Court may only consider external documents that are referenced therein and considered to be central to plaintiffs' claims. *See, Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). This is the first time that Plaintiffs refer to or allege a reduction of $12.50 per pay-period and that the paystubs did not explain why the PBPR withhold the additional employer health care contribution. Thus, this exhibit is a matter outside of Plaintiffs' pleadings and the Court cannot consider it because its review under Rule 12(b)(6) is limited to the allegations and documents attached to the Amended Complaint. All factual allegations included as exhibits in support of Plaintiffs' response in opposition to the motion to dismiss must be ignored by the Court. *See, Jackson v. Illinois Bell Telephone Co.*, 2002 WL 1466796, *2 (N.D. Ill. 2002); *Ramírez v. DeCoster*, 2012 WL 2367179, at *12 (D. Me. June 21, 2012) (The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the allegations in the complaint, not an opportunity to file a motion for summary judgment before discovery).

In same fashion, Plaintiffs misconstrued the exceptional continuing violation doctrine by arguing that this doctrine renders Plaintiffs' claims timely. The First Circuit has employed the continuing violation theory as an exception to the federal discovery rule to evaluate the timeliness of section 1983 actions. *See Muñiz–Cabrero v. Ruiz,* 23 F.3d 607, 610 (1st Cir.1994). "Under this doctrine, a plaintiff can recover for injuries that occurred outside the statute of limitations under certain narrow conditions." *Perez-Sanchez v. Pub. Bldg. Auth.*, 531 F.3d 104, 107 (1st Cir. 2008). The date of accrual is "delayed until a series of wrongful acts blossoms into an injury on which suit can be brought." *Gorelik v. Costin*, 605 F.3d 118, 120 (1st Cir. 2010) (citation omitted) (quoting *Morales-Tañón v. P.R. Elec. Power Auth.*, 524 F.3d 15, 18 (1st Cir. 2008)); *see Costin*, 605 F.3d at 121 ("The First Circuit has expressed that the continuing violation doctrine does not apply to discrete discriminatory and retaliatory acts that do not require conduct to establish an actionable claim") (citation and quotation omitted).[5]

That being so, the continuing violation doctrine "does *not* allow a plaintiff to avoid filing suit so long as some person continues to violate his rights." *Pérez-Sánchez v. Public Building Auth.*, 531 F.3d 104, 107 (1st Cir. 2008). Also, this doctrine is mostly applied "to seek damages for otherwise time-barred allegations if they are deemed part of an ongoing series of discriminatory acts and there is `some violation within the statute of limitations period that anchors the earlier claims.'" *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (quoting *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir.1998)); *see also, Davis v. Lucent Technologies*, Inc., 251 F.3d 227 (1st Cir. 2001). In the context of establishing a continuing violation under section

[5] The doctrine is routinely applied in actions arising from hostile work environment allegations. *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 406 (1st Cir. 2002) (noting that a "hostile work environment is comprised of a series of separate acts that collectively constitute one unlawful employment practice.") (quoting *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)).

1983, a plaintiff "must allege that a discriminatory act occurred or that a discriminatory policy existed' within the period prescribed by the statute." *Johnson v. Gen. Elec.*, 840 F.2d 132, 137 (1st Cir.1988) (quoting *Velázquez v. Chardón*, 736 F.2d 831, 833 (1st Cir.1984)).

The courts distinguish between continuing violations and the harmful effects of a discrete act. *See Muniz–Cabrero*, 23 F.3d at 611 (The "proper focus in continuing violation analysis is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." (emphasis in original) (internal citations omitted); *Morris v. Gov't Dev. Bank*, 27 F.3d 746, 750 (1st Cir. 1994) (A plaintiff "need not know all the facts that support his claim in order for countdown to commence"); *Dávila-Torres v. Feliciano-Torres*, 924 F. Supp. 2d 359, 368 (D.P.R. 2013).

Plaintiffs argued for first time that in each bi-weekly paycheck they continue to suffer the harm of the alleged discriminatory withholding of the additional health care employer contribution. But the specific conduct that Plaintiffs alleged in the Amended Complaint does not consist of a serial violation, but rather only one discrete act: the withholding of the $25 additional health care employer contribution one they decided on different dates to become non-members of the Union. *See*, *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 5–6 (1st Cir. 2007) (A claimant is deemed to 'know' or 'learn' of a discriminatory act at the time of the act itself and not at the point that the harmful consequences are felt.").

Thus, since the discrete act occurred more than a year before of the filing of the complaint, they are untimely claimed. Consequently, because Plaintiffs failed to bring their cause of actions under the statute of limitation of one-year and the continuing violation is inapplicable to this case, Plaintiffs' class action Amended Complaint should be dismissed with prejudice.

III. CONCLUSION AND PRAYER FOR RELIEF

Plaintiffs' arguments in opposition to Defendants' Motion to Dismiss the Amended Complaint boil down to impermissible amendments to their pleadings buried in the thick of legal parlance, a reading of *Janus* unsupported by its text and subsequent case law, and references to statute of limitations norms not applicable in the First Circuit. They failed to rebut Defendants' arguments for dismissal for failure to state a claim, and this Court should so conclude.

WHEREFORE, it is respectfully requested from this Honorable Court that this motion be granted, and that Plaintiffs' Class Action Amended Complaint be dismissed with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a digital copy of this document with the Clerk of the Court, who will automatically notify of such filing to all parties officially registered in the CM/ECF System.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 3rd day of November 2022.

DOMINGO EMANUELLI HERNÁNDEZ
Secretary of Justice

SUSANA I. PEÑAGARÍCANO-BROWN
Secretary in Charge of Litigation

MARCIA I. PÉREZ-LLAVONA
Director of Legal Affairs
Federal Litigation and Bankruptcy Division

s/ José R. Cintrón Rodríguez
José R. Cintrón-Rodríguez
USDC No. 204905
Email: jose.cintron@justicia.pr.gov

s/ Elisabet García Torres
Elisabet García-Torres
USDC No. 305605
Email: elisabet.garcia@justicia.pr.gov

Department of Justice of Puerto Rico
Federal Litigation Division
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192
Phone: 787-721-2900 Ext. 1480/1416