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**

MOTON TO DISMISS AMENDED COMPLAINT
UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

TO THE HONORABLE COURT:

COMES NOW, the Department of Justice of the Commonwealth of Puerto Rico, on behalf of **Jojanie Mulero Andino**, in her personal capacity and on behalf of **Antonio López Figueroa**, in his personal capacity and without submitting to this Court's jurisdiction, represented by the undersigned counsel, and respectfully state and pray as follows:

I. INTRODUCTION

On August 18, 2022, Plaintiffs file an Amended Complaint alleging violations to their constitutional rights under the First Amendment pursuant to 42 U.S.C.A. § 1983 (Docket No. 22). They seek declaratory and injunctive relief, as well as compensatory and punitive damages, and attorney's fees against the appearing Co-Defendants, both in their official and personal capacities. Id. This, for an alleged unlawful conduct of coercing them to become and remain members of the Union of Organized Civilian Employees (hereinafter "UOCE"). Id.

As to co-defendant Mulero, Plaintiffs allege that she is directly responsible for carrying out employee payroll deductions and awarding employer benefits, such as the additional employer

contribution of $25 per month toward employees' healthcare costs and that she "has had direct or constructive knowledge of the practice of withholding the additional employer contribution of $25 per month from those employees who have objected to membership in the Union and to payroll deductions in favor of the Union". (Id. at p. 8, ¶40). In same fashion, as to co-defendant López, Plaintiffs allege that "[a]s Mulero's supervisor and appointing authority, López has allowed the denial of the additional employer contribution to continue unabated. López's inaction in remedying this unconstitutional practice constitutes supervisory encouragement, condonation, acquiescence, or gross negligence amounting to deliberate indifference". (Id. at p. 18, ¶100).

Appearing co-defendants hereby move for dismissal of the Amended Complaint based on the legal grounds previously argued in the Motion to Dismiss Amended Complaint at Docket No. 32, hereby adopted by reference, and because it is clear that Plaintiffs allegations are insufficient to show that they have personal involvement in the events on which the claims are grounded. Even if is determined that Plaintiff's allegations are sufficient to properly state a claim, appearing co-defendants are entitled to qualified immunity.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

A. Standard on Motion to Dismiss.

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to assert the defense of failure to state a claim upon which relief can be granted, before pleading, if a responsive pleading is allowed. Fed.R.Civ.P. 12(b)(6). Under this rule, a complaint may not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See, Brown v. Hot, Sexy and Safer Products, Inc.,* 68 F.3d 252, 530 (1st Cir. 1995). The Court accepts all well pleaded-factual allegations as true and indulges all reasonable inferences in Plaintiff's favor. *See, Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006). The

Court need not credit, however, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when evaluating the Complaint's allegations. *See, Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir. 1996).

When opposing a Rule 12(b)(6) motion, "a plaintiff cannot expect a trial court to do his homework for him." *See, McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22 (1st Cir. 1991). Plaintiffs are responsible for putting their best foot forward to present a legal theory that will support their claim. Id. at 23. Plaintiff must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under actionable theory." *See, Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir 1988). A complaint is properly dismissed for failure to state a claim "only if the facts lend themselves to no viable theories of recovery." *See, Luc v. Wyndham Management Corp.*, 496 F.3d 85, 88 (1st Cir. 2007).

To survive a motion to dismiss for failure to state a claim, a complaint must contain factual allegations sufficient to "raise a right to relief above the speculative level." *See, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 545.

Under *Twombly,* the factual allegations which are assumed to be true must do more than create speculation or suspicion of a legally cognizable cause of action; they must demonstrate the plausibility of entitlement to relief. *Twombly*, 550 U.S. at 555, 557; *Accord, Sanchez v. Pereira Castillo*, 590 F.3d 31, 41 (1st Cir. 2009); and *MVM Inc. v. Rodríguez*, 568 F. Supp. 2d 158, 167 (D.P.R. 2008).

To make this determination, the court employs a two-pronged approach. *See, Ocasio–Hernández v. Fortuño–Burset*, 640 F.3d 1, 12 (1st Cir. 2011). The court first screens the complaint for statements that "merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action." *Id.* (citations, internal quotation marks and alterations omitted). A claim consisting of little more than "allegations that merely parrot the elements of the cause of action" may be dismissed. *Id.* The second part of the test requires the court to credit as true all non-conclusory factual allegations and the reasonable inferences drawn from those allegations, and then to determine if the claim is plausible. *Id.* The plausibility requirement "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of illegal conduct. *Twombly*, 550 U.S. at 556. The "make-or-break standard" is that those allegations and inferences, taken as true, "must state a plausible, not a merely conceivable, case for relief." *Sepúlveda–Villarini v. Dep't of Educ.*, 628 F.3d 25, 29 (1st Cir. 2010); see *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citations and footnote omitted)).

Evaluating the plausibility of a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, at 679. In doing so, the court may not disregard properly pleaded factual allegations or "attempt to forecast a plaintiff's likelihood of success on the merits." *Ocasio–Hernández*, 640 F.3d at 13. "The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Id.*

In the case of the affirmative defense of statute of limitations, dismissal "is entirely appropriate when the pleader's allegations leave no doubt that an asserted claim is time-barred."

LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 509 (1st Cir. 1998). Dismissal follows where the dates indicated by the complaint establish that the statute of limitations has run, and "the complaint fails to sketch a factual predicate that would warrant the application of either a different statute of limitations period or equitable estoppel." *See, Trans–Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 320 (1st Cir. 2008); *see also, Aldahonda–Rivera v. Parke Davis & Co.*, 882 F.2d 590, 592 (1st Cir. 1989) ("When a defendant raises an affirmative defense that is obvious on the face of plaintiff's pleadings, and the court makes the ruling based only on those pleadings, the motion is treated as a Rule 12(b)(6) motion to dismiss.").

B. Motion to Dismiss filed at Docket No. 32.

The appearing co-defendants hereby adopt by reference the legal grounds for dismissal discussed in the Motion to Dismiss Amended Complaint at Docket No. 32 in its entirety, in addition to the grounds that will be discussed in the instant motion.

C. Plaintiffs failed to state a Section 1983 claim against appearing Co-Defendants in their personal capacities.

Section 1983 allows individuals to sue certain persons for depriving them of federally assured rights under color of state law. 42 U.S.C.A. § 1983. *Fincher v. Town of Brookline*, 26 F.4th 479 (1st Cir. 2022). It authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). Section 1983 does not create any independent substantive rights; it is only a procedural vehicle to vindicate constitutional and other federal statutory violations brought about by state actors. *See, Baker v. McCollan*, 443 U.S. 137, 145, n.3 (1979) ("Section 1983 . . . is not itself a source of substantive rights, but [merely provides] a method for vindicating federal rights elsewhere conferred . . ."); *Albright v. Oliver*, 210 U.S. 266

(1994). It merely provides a mechanism to remedy for deprivations of rights that are federally enshrined elsewhere. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

To state a valid § 1983 claim a plaintiff must allege that: (l) defendants were acting under color of state law; (2) they were in fact deprived of a federally protected right; and (3) defendants were personally involved in the violation. *Caraballo Cordero v. Banco Financiero de Puerto Rico*, 91 F.Supp.2d 484, 489 (2000); *Gutiérrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir. 1989).

First, a plaintiff must establish that "the conduct complained of was committed by a person acting under color of state law*." Parrat v. Taylor*, 451 U.S. 527, 535 (1981). However, "it is not enough for an individual merely to purport to exercise official power in order to trigger § 1983 liability, but rather the individual must actually be engaged in the abuse of official power granted by the government." *Blasko v. Doerpholz*, 2016 WL 11189804, at *13 (D. Mass. Aug. 22, 2016) (citing *Parilla-Burgos v. Hernández-Rivera*, 108 F.3d 445, 449 (1st Cir. 1997)).

Second, a plaintiff must allege facts sufficient to conclude that the alleged conduct worked a denial of rights secured by the Constitution or laws of the United States. *Cepero-Rivera v. Fagundo*, 474 F.3d 124 (1st Cir. 2005). A Section 1983 violation occurs when an official acting under color of state law acts to deprive an individual of a federally protected right. *Maymí v. Puerto Rico Ports Authority*, 515 F.3d 20, 25 (1st Cir. 2008). Moreover, the plaintiff must show "that the [defendant's] conduct was the cause in fact of the alleged deprivation." *Gagliardi v. Sullivan*, 513 F.3d 301, 306 (1st Cir. 2008) (quoting *Rodríguez-Cirilo v. García*, 115 F.3d 50, 52 (1st Cir.1997)).

Therefore, under this section, liability in damages can only be imposed upon officials who were involved personally in the deprivation of constitutional rights. *Kostka v. Hogg*, 560 F.2d 37, 40 (1st Cir.1977). This means a showing of a causal connection or affirmative link between the

specific defendant and plaintiff's federal rights deprivation. *Lipsett v. University of Puerto Rico,* 864 F.2d 881, 902 (1st Cir.1988). "It is axiomatic that the liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions." *Braga v. Hodgson*, 605 F.3d 58, 61 (1st Cir. 2010) (quoting *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). Accordingly, the plaintiff must show "that the [defendant's] conduct was the cause in fact of the alleged deprivation." *Gagliardi v. Sullivan*, 513 F.3d 301, 306 (1st Cir. 2008) (quoting *Rodríguez-Cirilo v. García*, 115 F.3d 50, 52 (1st Cir.1997)).

All this may consist of direct acts by the defendant, certain acts performed at defendant's direction, or knowledge and consent. *Rodríguez–Vázquez v. Cintrón–Rodríguez,* 160 F.Supp.2d 204, 209 (D.P.R.2001). Each defendant individually responds for his own acts and omissions in the light of his own duties. *See, Monell v. Department of Social Services of City of New York,* 436 U.S. 658 (1978). In other words, as there is no *respondeat superior* liability under Section 1983, liability in damages can only be imposed upon officials who were personally involved in the deprivation of constitutional rights. *Lipsett*, 864 F.2d at 901– 902.

Thus, in the absence of personal and intentional conduct, supervisory responsibility by itself is not sufficient to survive a motion to dismiss. *See Peñalbert Rosa v. Fortuño Burset,* 631 F.3d 592, 595 (1st Cir. 2011) ("bald assertions" and "unsupportable conclusions" are insufficient to establish personal participation in the unlawful conduct).

In their Amended Complaint, Plaintiffs allege, relying exclusively on the ruling of *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, ___ U.S. ___, 138 S. Ct. 2448 (2018),* that a $25 monthly additional employer contribution for health insurance costs only provided to dues-paying union members amounts to unconstitutional coercion for them, as nonmembers, to become and remain members of the union, allegedly in violation of their free speech and non-association

First Amendment rights. (Docket No. 22 at p. 5, ¶20). In this way, Plaintiffs claim that co-defendant Mulero should be personally liable because she is directly responsible for carrying out employee payroll deductions and awarding employer benefits, such as the additional employer contribution of $25 per month toward union members employees' healthcare costs. (Id. at p. 8 ¶40). Plaintiffs also allege that since her appointment as Human Resources Director on March 8, 2021, she "has had direct or constructive knowledge of the practice of withholding the additional employer contribution of $25 per month from those employees who have objected to membership in the Union and to payroll deductions in favor of the Union". *Id.* In addition, they aver that as Human Resources Director she continues to fulfill the UOCE request of discontinuing the additional employer contribution to every employee who objects to union payroll deductions, and she bears direct responsibility for awarding this contribution to members of the Union while denying it to them. *Id.* Lastly, Plaintiffs allege that on March 31, 2022, Plaintiff Carbonell wrote to Mulero to demand that the additional employer contribution of $25 per month be restored as a benefit of employment with PRPB and that Mulero never responded. (*Id*. at p 10, ¶47).

Regarding co-defendant López, Plaintiffs allege that "[a]s Mulero's supervisor and appointing authority, López has allowed the denial of the additional employer contribution to continue unabated. López's inaction in remedying this unconstitutional practice constitutes supervisory encouragement, condonation, acquiescence, or gross negligence amounting to deliberate indifference." (Id. at p. 18, ¶100).

In sum, Plaintiffs allege in an unspecific, speculative, and conclusory manner that co-defendants Mulero and López knew or should have known of the withholding of the additional employer contribution of $25 per month from Plaintiffs. Then, to that extent Plaintiffs imply that by their alleged omissions, they acquiesced to the unconstitutional withholding of the additional

health insurance contribution of $25.00 per month for being nonmembers employees and for that reason they should be found personally liable for Plaintiffs claims.

However, Plaintiffs complaint lacks sufficiently specific allegations as to how appearing co-defendants Mulero and López acted under color of state law to deprive Plaintiffs of their constitutional right of non-association to be found personally liable. Plaintiffs' allegations are not specific regarding co-defendants' personal involvement in the alleged decision of withholding the $25.00 health insurance contribution and do not provide enough facts to establish the required causation to link their actions with the alleged constitutional violation. *See Collins v. City Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)(to succeed in a section 1983 action, therefore, a plaintiff must prove that the defendant's actions were a cause in fact or a proximate cause of the plaintiff's injury); *see also Hegarty v. Somerset County*, 53 F.3d 1367, 1379-80 (1st Cir. 1995)(the 'affirmative link' requirement contemplates proof that the conduct led inexorably to the constitutional violation). Plaintiffs' pleadings contain no descriptions of specific decisions or specific actions taken at specific dates regarding the events on which their Amended Complaint is grounded but only general references to their supervisory duties in their respective areas.

In addition, Plaintiffs did not "indicate any personal action or inaction by a defendant ... within the scope of ... [their] responsibilities that would make [them] personally answerable in damages under section 1983." *See Pinto v. Nettleship*, 737 F. 2d 130, 133 (1st Cir. 1984). Here, Plaintiffs do not plausible allege that co-defendants alleged indifference or omissions were "manifest to any reasonable official that [their] conduct was very likely to violate an individual's constitutional rights." *Hegarty*, 53 F.3d at 1380. A thorough reading of the Amended Complaint

fails to reveal that co-defendants' conduct amounted to condonation or tacit authorization of the alleged constitutional violation. *Rogan*, 175 F.3d at 78.

Neither do they specifically allege how co-defendants' actions or inactions can be categorized as unconstitutional coercion. Furthermore, Plaintiffs failed to allege that co-defendants issued any specific order to execute Plaintiffs' withholding of the $25 additional healthcare contribution beyond fulfilling the UOCE's request or that in effect they personally did so. To the contrary, Plaintiffs only stated general speculative and conclusory allegations concerning co-defendants' alleged roles because of their positions, without alleging any fact showing direct involvement in the alleged withholding of the additional contribution of $25 per month.

As stated, Plaintiffs failed to plausibly plead that co-defendants violated a statutory or constitutional right and that they were in fact deprived of a federally protected right. As stated in the Motion to Dismiss at Docket No. 32, p. 12-16, the ruling in *Janus* is limited and restricted to the constitutionality of agency-fees and has not been found applicable 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 Amendment is not violated where a democratically selected union serves as the exclusive bargaining agent for all employees").

Nor did *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). Stated differently, "[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.

Hence, Plaintiffs are grounding their allegations on an unrecognized constitutional right, since *Janus* did not establish that non-members should enjoy the same benefits as union members nor recognized any coercion doctrine in favor of them. Plaintiffs' pleadings do not state a plausible claim that co-defendants' actions or omissions constitute a depravation of their constitutional right of non-association. Lastly, Plaintiffs' Amended Complaint is devoid of enough facts to "raise a right to relief above the speculative level." *See Twombly,* 550 U.S. 544, 127 S.Ct. at 1965, 1967.

Simply put, and as argued in the Motion to Dismiss at Docket No. 32 p. 16, Plaintiffs' claims boil down to a grievance against the UOCE for having bargained and obtained from the employer greater health insurance contribution benefits for its dues-paying members than for its non-paying members. This may or may not be a breach of the union's duty of fair representation, which requires it to represent them adequately as well as honestly, in good faith, and in a non-discriminatory manner. *See Air Line Pilots Assoc. v. O'Neill,* 499 U.S. 65, 74-75 (1991). But it

hardly constitutes a violation of a federally protected right entitling them to relief under Section 1983.

D. Co-Defendants are entitled to Qualify Immunity.

The qualified immunity doctrine protects government officials who perform discretionary functions from suit and from liability for monetary damages under 42 U.S.C. 1983. *See Roldán–Plumey v. Cerezo–Suárez,* 115 F.3d 58, 65 (1st Cir. 1997). Officials are shielded by qualified immunity to permit them to fulfill their professional responsibilities without hesitation born of fear of liability. *Anderson v. Creighton,* 483 U.S. 635, 638 (1987).

This protection is more than a mere defense of liability; it is an immunity from suit. *Santana v. Calderón*, 342 F.3d 18, 23 (1st Cir. 2003). For this reason, immunity is to be resolved at the earliest possible stage in litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2 (1987) (stating that the doctrine ensures that insubstantial claims against government officials will be resolved before discovery); *Iqbal* at p. 1953 (quoting *Siegert v. Gilley,* 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) ("[t]he basic thrust of the qualified immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery'").

At the initial pleading stage, the qualified immunity analysis must be based on the facts stated in the complaint. *Vélez-Díaz v. Vega-Irizarry,* 421 F.3d 71, 78 (1st Cir. 2005) (citing *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 61 (1st Cir. 2004)). Thus, qualified immunity shields federal and state officials from liability unless a plaintiff pleads facts showing "(1) that the official violated a statutory or constitutional right and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

"A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021)(citing *Mullenix v. Luna*, 577 U.S. 7, 11 (2015); *see also Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"); *Diaz-Bigio v. Santini*, 652 F.3d 45, 50–51 (1st Cir. 2011) ("A right is clearly established and immunity will not issue only if "*every* 'reasonable official would have understood that what he is doing violates that right.' " *Id.* at 2083 (quoting *Anderson*, 483 U.S. at 640); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (Whenever "officers of reasonable competence could disagree" on the lawfulness of the action, they are entitled to immunity.)

If both requirements are found to be present, to determine the applicability of the qualified immunity doctrine, the Court of Appeals for the First Circuit employs an additional step as subpart of the second prong: "… whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right." *Wilson v. City of Boston*, 421 F.3d 45, 52 (1st Cir.2005). Importantly, "[c]ourts need not engage in the first inquiry and may choose, in their discretion, to go directly to the second." *Penate v. Hanchett*, 944 F.3d 358, 366 (1st Cir. 2019). Although the Supreme Court's "case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Rivas-Villegas*, at 7-8.

Moreover, the First Circuit has held that, "only where the action in question is *clearly* unlawful does a defendant lose his qualified immunity." *Juarbe-Angueira v. Arias*, 831 F.2d 11, 12 (1st Cir.1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that

in the light of pre-existing law the unlawfulness must be apparent." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). More simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In sum, the general rule regarding qualified immunity is that government officials are immune from suit when their conduct does not violate clearly established statutory authority or constitutional rights, which a reasonable person should have known of at the time of the conduct at issue. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

As stated above, Plaintiffs' allegations do not meet the requirements to find Co-Defendants Mulero and López personally liable for the withholding of the additional $25.00 health care contribution. Moreover, they are entitled to qualified immunity. Plaintiffs failed to plead that Co-Defendants Mulero and López violated their constitutional right of non-association. In that regard, Plaintiffs are attempting to extend the holding on *Janus* by speculating that López and Mulero should be also found personally liable for their alleged involvement in the withholding of the additional $25 healthcare contribution. However, *Janus's* holding is limited to the unconstitutional practice of the compulsory fees' deductions to public employees that decide to become non-members of a union. For that reason, Plaintiffs cannot allege their constitutional rights are being violated, since they have failed to allege any ill motive or disregard by the Co-Defendants Mulero and López to deprive them of their right of non-association.

Even if *Janus'* ruling is stretched to infer the recognition of the constitutional violation that Plaintiffs are suggesting, it is not clearly established under the law for a reasonable person to have known it at the time of the conduct at issue. *See e.g., Kauch v. Dep't For Children, Youth & Their Families*, 321 F.3d 1, 4 (1st Cir. 2003) (qualified immunity applies if the asserted constitutional right was not "clearly established" at the time of the alleged violation). Nor they

have alleged that they, as reasonable officers, knew that with their actions or omissions they were violating Plaintiffs constitutional rights. *Maldonado v. Fontanes,* 568 F.3d 263, 269 (1st Cir. 2009) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right").[1]

In short, the Amended Complaint points to no facts or authority to demonstrate that appearing co-defendants' actions violated a clearly established constitutional right, since the alleged constitutional grievance on which Plaintiffs ground their claim does not fall squarely within *Janus*'s textual contours. That being so, co-defendants in their individual capacity are entitled to qualified immunity and the personal capacity claims in the Amended Complaint should also be dismissed with prejudice.

III. CONCLUSION & PRAYER FOR RELIEF

Plaintiffs' claims for monetary relief against the appearing Co-Defendants in their personal capacities should be dismissed at this stage of the proceedings because Plaintiffs allegations are insufficient to show that they had personal involvement in the events on which their claims are grounded. Also, they are entitled to qualified immunity on the factual and legal grounds set forth in this motion.[2] This, in addition of the conclusion and prayer for relief that Co-Defendants stated

[1] Likewise, *Janus* contains several *dictums* that should not be taken into consideration in determining whether the appearing Co-Defendants have a clearly established constitutional right. *See Merrimon v. Unum Life Ins. Co. of America,* 758 F.3d 46, 57 (1st Cir. 2014) (citation omitted) (Dicta are those observations inessential to the determination of the legal questions in each dispute.), *see also Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent").

[2] While Plaintiffs claimed to be pleading against appearing Co-Defendants constitutional claims under the Fourteenth Amendment (See Docket No 22 at p. 6, ¶24 & P. 19-20 at ¶108), in their Prayer for Relief they made it clear that their claim was a First Amendment claim "as secured against State infringement by the Fourteenth Amendment and 42 U.S.C. §1983" (Id, p. 22-23, ¶ B). Therefore, the Court must conclude that they set forth no independent Fourteenth Amendment claim against which Co-Defendants can invoke dismissal grounds.

at the Motion to Dismiss Amended Complaint, Docket No 32, pp. 19 & 20, which are hereby incorporated by reference.

WHEREFORE, it is respectfully requested from this Honorable Court that this motion be granted, and that Plaintiffs' Class Action Complaint as to the appearing Co-Defendants personal capacities 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.

In San Juan, Puerto Rico, this 18th day of October 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/ Elisabet García Torres
Elisabet García-Torres
USDC No. 305605
Email: elisabet.garcia@justicia.pr.gov

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