

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

<p>Scott Solomon,                      Plaintiff,  v.  American Federation of State, County and Municipal Employees, District Council 37, AFL-CIO,                      Defendant.</p>	<p>No. 1:19-cv-06823-GBD  Hon. Judge George B. Daniels  <b>Letter Motion to Extend Stay</b></p>
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Plaintiff Scott Solomon respectfully moves this Court to extend the stay it previously entered in this case until the matter of *Wholean v. CSEA SEIU Local 2001*, 19-1563 is resolved by an *en banc* panel of the United States Court of Appeals for the Second Circuit and in support states as follows:

1. Plaintiff Scott Solomon and Defendant American Federation of State, County and Municipal Employees, District Council 37, AFL-CIO (“District Council 37”), previously jointly moved this Court to stay all proceedings in this matter, including District Council 37’s deadline to respond to the Complaint, pending a decision by the United States Court of Appeals for the Second Circuit in *Wholean v. CSEA SEIU Local 2001*, 19-1563<sup>1</sup> (ECF No. 14). That joint motion was granted,

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<sup>1</sup> One of the public interest law firms providing legal assistance to Plaintiff in this case (National Right to Work Legal Defense Foundation) also represents the plaintiffs in *Wholean*.

with this Court ordering the parties to notify the Court within 30 days of a decision by the Second Circuit (ECF No. 16).

2. The Plaintiffs in *Wholean*, like Plaintiff here, seek the return of agency fees remitted from non-members of the defendant union prior to the Supreme Court's decision in *Janus*. The District Court in *Wholean* dismissed the complaint finding that the plaintiffs' claim was barred by a good-faith defense available to private parties sued under 42 U.S.C. § 1983 as a matter of law, because the defendant union collected those fees in reliance on a state law that later was declared unconstitutional.

3. On April 15, 2020, the Second Circuit issued its opinion in *Wholean*, which affirmed the district court's dismissal of that action.

4. On April 29, 2020, the appellants in *Wholean* filed a petition for rehearing *en banc*, noting that the Second Circuit's *Wholean* opinion conflicts with a prior decision; that the opinion recognized a reliance defense not previously recognized by the Second Circuit; and that the opinion conflicts with previously-established retroactivity principles. A true and correct copy of the appellants' petition for rehearing in *Wholean* is attached as Exhibit A.

5. On May 6, 2020, Defendant District Council 37 filed a Notice of the Second Circuit's Decision in *Wholean*. (ECF No. 17).

6. As it indicated in its Notice, District Council 37 intends to file a motion to dismiss in which it will raise a good-faith defense akin to the good-faith defense that the union defendant successfully raised in *Wholean*. As a result, the outcome of

*Wholean* before the Second Circuit will at least have a significant impact on the legal arguments made in this case, if not be dispositive of the merits of this case.

7. Counsel for Plaintiff asked counsel for Defendant whether the Defendant would agree to join this motion to extend the stay pending the *en banc* petition in *Wholean*, but counsel for Defendant indicated that Defendant does not agree with extending the stay in this case pending the *en banc* petition in *Wholean*.

8. Even if it is unlikely that the Second Circuit will grant the petition for rehearing *en banc* in *Wholean*, it still makes sense to grant this motion to extend the stay now. If this case were to proceed with a stay, but the Second Circuit were to grant the petition for rehearing in *Wholean*, because of the overlapping issues in this case and that case, the outcome of the full panel of the Second Circuit in *Wholean* would almost certainly affect the outcome in this case. Thus, a stay would make sense if the Second Circuit grants the petition for *en banc* review. But, even if the Second Circuit denies that petition, extending the stay now makes sense because it would not significantly delay the proceedings in this case since the time between now and when the Second Circuit issues a decision on the *en banc* petition will likely be short — perhaps no longer than 30 days.

9. Counsel for Plaintiff propose this stay in order to save judicial resources, as well as the resources of the parties in briefing a legal issue that already is pending before the Second Circuit.

10. Therefore, Plaintiff proposes that this Court stay this case pending the *en banc* decision by the Second Circuit in *Wholean*. Should the Second Circuit deny

that petition, then Plaintiff agrees that this case should proceed thereafter. But should the Second Circuit grant the petition, then this case should remain stayed pending the outcome of the full panel of the Second Circuit in *Wholean* due to the overlapping nature of the claims in both cases.

WHEREFORE, Plaintiff respectfully requests that the Court stay all further proceedings in this case until after the United States Court of Appeals for the Second Circuit has disposed of *Wholean v. CSEA SEIU Local 2001*, 19-1563 *en banc*.

Dated: May 8, 2020

Respectfully submitted,

/s/ Jeffrey M. Schwab

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