IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

LUKAS DARLING, et al. Plaintiffs, vs. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al. Defendants.	CASE NO: CASE NO: 22cv008864 JUDGE JAIZA PAGE PLAINTIFFS' MEMORANDUM CONTRA TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs Chelsea Kolacki, Kristy Kolacki, Laura Langsdale, Steven Tulga and Ronnie Legg ("Plaintiffs") respectfully oppose Defendant Ohio Association of Public School Employees-AFSCME Local 4's ("OAPSE" or "the Union")'s Motion to Dismiss.[1] OAPSE argues that this Court lacks subject matter jurisdiction over this action because, it asserts, the claims set-forth in the Amended Complaint are subject to the exclusive jurisdiction of the State Employees Relations Board ("SERB"). While SERB undoubtedly has exclusive jurisdiction over claims arising from a collective bargaining agreement or the statutory protections of R.C. 4117, the Ohio Supreme Court has long held that "SERB does not have exclusive jurisdiction over every claim that can somehow be cast in terms of an unfair labor practice" and when "a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court."

[1] The listed Plaintiffs are the only plaintiffs remaining in the suit, and OAPSE is the only remaining Defendant, all other claims having been settled and dismissed.

Keller v. Columbus, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 14; *E. Cleveland v. E. Cleveland Firefighters Local 500, I.A.F.F.*, 70 Ohio St.3d 125, 127–29, 637 N.E.2d 878, 880 (1994). Here, all of the Plaintiffs' claims arise from the common law of contract and the personal contract that each Plaintiff entered into with OAPSE when he or she signed a Union card. None of the Plaintiffs' contractual claims arise from or implicate any of the Union's collective bargaining agreements with any public employer.

Nor do any of the Plaintiffs claims allege an unfair labor practice by the Union that might be subject to SERB's exclusive jurisdiction. Rather, the Plaintiffs seek declaratory relief regarding the validity of their contracts with the Union and the Union's entitlement to liquidated damages under them. Or in the alternative, if the Court determines that these contracts were invalid, the Plaintiffs seek to recover on the theory of common law unjust enrichment. All of the contract-based causes of action existed as a basis for relief well before R.C. 4117's enactment in 1983. The Plaintiffs' claims thus arise independent of R.C. 4117 or any collective bargaining agreement. Accordingly, this Court has subject matter jurisdiction and OAPSE's motion to dismiss should be denied.

II. FACTUAL AND LEGAL BACKGROUND

A. The Post-Janus Legal Landscape

In *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, the U.S. Supreme Court held that the First Amendment protects public-sector employees from being compelled "to subsidize private speech on matters of substantial public concern" without prior affirmative consent. 138 S.Ct. 2448, 2460, 201 L.Ed.2d 924 (2018). The Court rejected the requirement that forced government employees either to pay monthly dues or agency fees, used to support union policies and union lawyers, even when employees objected to those policies and actions. Non-

payment would trigger employment termination. But "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* at 2463. *Janus* made clear that unions and governments cannot continue to compel "free and independent individuals to endorse ideas they find objectionable." *Id.* at 2464. Notably, the plaintiff in *Janus* was not and had never been a union member when he sought to escape the agency fees forced upon him.

Several federal appellate courts have seized on this distinction to hold that the *Janus* rule does not apply to employees who have voluntarily entered into a contract with a union. In those cases, courts have held that an employee's ability to opt-out of union membership after he has signed a contract with the union—typically a post-card sized union membership card—is governed solely by that contract and the applicable state contract law. *See Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020)("When 'legal obligations ... are self-imposed,' state law, not the First Amendment, normally governs."); see also . . .

In the wake of *Janus*, many Unions began including opt-out windows in their contracts with their members. And while employees retained an absolute right to resign from union membership at any time, *see, e.g., Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), in *Belgau* and cases like it, unions have successfully argued that employees who resigned their union membership outside of the opt-out window were required by contract to continue to pay dues to a union to which they now longer belonged. Indeed, unions, including OAPSE have been quick to argue that agreements between the Union and its members are See OAPSE brief in Littler.

Since courts have held that an employee's decision to resign from a union is governed by state contract law, the Plaintiffs have brought a state contract law case. The Plaintiffs here are not bringing a *Janus* case. They are not alleging the violation of any constitutional right. Nor do they

claim that OAPSE has engaged in an unfair labor practice. Rather they are alleging that their individual contracts with OAPSE are invalid under well-established contract law, or to the extent that they are valid, the provision requiring the continued payment of dues after they have left the Union is an unenforceable penalty and not liquidated damages.

III. ARGUMENT

A. Standard for Motion to Dismiss

In deciding a motion to dismiss, the court presumes that the complaint's factual allegations are true and makes all reasonable inferences in the nonmoving party's favor. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12, citing *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). To grant the motion, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Sherman v. Ohio Pub. Employees Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602.

In cases where the defendant has challenged the court's subject matter jurisdiction, the test is whether the complaint states *any* cause of action cognizable by the forum. *State ex rel. Bush v. Spurlock*, 42 Ohio St. 3d 77, 80; 537 N.E. 2d 641 (1989).

B. R.C. 4117 Does Not Divest this Court of Jurisdiction

The Union argues that this Court lack jurisdiction to hear this case, casting the Plaintiffs' claims as unfair labor practices and thus subject to SERB's exclusive jurisdiction. But Ohio law is clear that "SERB does not have exclusive jurisdiction over every claim that can somehow be cast in terms of an unfair labor practice." *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 14. Indeed, the Ohio Supreme Court has specifically rejected the Defendants' view of SERB's broad pre-emption power stating that "to hold that only SERB has

jurisdiction to hear or determine anything that "arguably" constitutes an unfair labor practice is neither a complete nor totally correct statement of the law set forth in R.C. Chapter 4117 or the decisions of this court." *E. Cleveland v. E. Cleveland Firefighters Local 500, I.A.F.F.,* 70 Ohio St.3d 125, 127–29, 637 N.E.2d 878, 880 (1994).

While Ohio law grants SERB exclusive jurisdiction in disputes relating to the "new rights and remedies" created by R.C. 4117, "if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court." *Franklin Cnty. Law Enforcement Assoc. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167,171(1991). Indeed, the *Franklin Cnty. Law Enf't Ass'n* Court specifically noted "common-law contractual rights that exist independently of R.C. 4117" as an example of claims where SERB's jurisdiction would not be exclusive. *Id.* But if the rights asserted "exist independently of R.C. Chapter 4117, such claims may be raised in common pleas court even though they may touch on the collective bargaining relationships between employer, employee, and union." *Id.* at 172; see also, *Ohio Assn. of Pub. School Emps./AFSCME Local 4, AFL-CIO v. Madison Local School Dist. Bd. of Edn.*, 11th Dist. No. 2009-L-148, 190 Ohio App.3d 254, 2010-Ohio-4942, 941 N.E.2d 834, ¶ 47 ("It is well established that if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may be properly heard in common pleas court.").

1. Nature of the Contracts at Issue

Here, the contracts in dispute are not collective bargaining agreements between public employers and the Union. They are instead the private contracts of Union membership between the Union and the Plaintiffs. These contracts do not touch on any collective bargaining topic. They are instead limited to the relationship between the Union and the Plaintiffs. Under the contracts, the Plaintiff agree to become Union members. As Union members, the Plaintiffs would then

receive some benefits or privileges from Union membership in exchange for dues paid to the Union through paycheck deductions.

Nor do the contracts at issue relate to any collective bargaining services that the Union is statutorily obligated to provide to the Plaintiffs. The Union's duty to represent the Plaintiffs in collective bargaining arises by statute and applies to all employees who are members of the bargaining unit, regardless of whether they are currently or ever have been a member of the Union. R.C. 4117.03-06. The Union cannot disclaim those obligations any more than the employees can opt-out of the bargaining unit. *See Janus*, 138 S. Ct. at 2460. The contracts in question do not touch on any of these statutory duties, however. They govern only the conditions under which employees join or resign from the Union and any benefits—necessarily separate and apart from the Union's statutory obligations as the bargaining unit representative—that the Plaintiffs might receive in exchange for their dues.

2. The Plaintiffs claims do not arise from or depend on the Collective Bargaining Agreement.

Ohio's enactment R.C. 4117 was not intended to broadly preempt any claims that might relate to public employment. Instead, as the *Franklin Cnty. Law Enf't* Court made clear, "[t]hat chapter [R.C. 4117] was meant to regulate in a comprehensive manner the labor relations between public employees and employers." *Id.* It was not intended "to give SERB exclusive jurisdiction over claims that a party might have in a capacity other than as a public employee, employer, or union asserting collective bargaining rights." *Id.* Plainly, while this dispute is tangential to their public employment, the Plaintiffs are not asserting any rights related to collective bargaining or pursuing causes of action that were created by R.C. 4117.

Rather, the Plaintiffs' contract-based claims arise from common law independent of R.C. 4117. Specifically, the Plaintiff's claims for declaratory judgment that the contracts have been

repudiated, rescinded for mutual mistake, or that the continued imposition of dues constitutes an unenforceable penalty for the Plaintiff's breach of the contract, and that the contract that does not disclose the price of the goods or services—in this case the dues to be collected—is unconscionable. All of these contract-based theories and the legal remedies sought under them existed long before R.C. 4117's 1983 enactment.

For example, the rule against unreasonable liquidated damages as an unenforceable penalty that the Plaintiffs seek to enforce in Count Three of the Amended Complaint appears as far back in Ohio law as 1853. *See Lange v. Werk,* 2 Ohio St. 519, 533, 1853 WL 117 (1853)("[A]s the stipulated sum may greatly exceed the actual injury, courts have uniformly regarded it as a in the nature of a penalty to secure the actual damages, unless it was *clearly* intended otherwise by the parties . . .)(emphasis in original)*; see also; American financial Leasing & Serv. Co. v. Miller*, 41 Ohio App.2d 69, 72 (10th Dist. 1974)("Stipulations for liquidated damages are often treated as penalties because of the inequities that would result from the strict enforcement of the stipulations, and there is a marked tendency on the part of the courts to construe stipulations for liquidated damages as penalties." (internal citations omitted).

If the membership contracts between the Plaintiffs and the Union are valid—and the Union insists that they are—the Plaintiffs plainly breached those contracts by opting out of the Union outside of their respective contractual windows. Despite no longer providing services, the Union continued to receive dues paid through forced paycheck deductions from the Plaintiffs. Plaintiffs thus seek a declaratory judgment that the continuation of dues deductions after the Union acknowledged their resignations and ceased providing them any member benefits is an unenforceable penalty. Ohio courts have held that "[p]enalty provisions in contracts are held invalid on public policy grounds because a penalty attempts to coerce compliance." *Satterfield v.*

Adams Cnty./Ohio Valley School Dist., 4th Dist. Adams No. 95CA611, 1996 WL 655789, *7 (citing *Lake Ridge Academy v. Carney*, 66 Ohio St. 3d 376 at 381(1993)). The Plaintiffs' claim is that the continuing dues deductions made after they resigned and the Union stopped providing benefits are not related to any injury that the Union suffered but is instead a penalty intended to coerce compliance with the union membership contract. An employee's decision to join or leave a Union, however, has nothing to do with the collective bargaining rights created and protected by R.C. 4117. Instead—as OAPSE told the Sixth Circuit Court of Appeals in *Littler v. OAPSE*—"whether a union can collect membership dues from a given employee turns on the 'private judgments' of the employee and the union.'" *Littler v. OAPSE*, U.S. Court of Appeals for the Sixth Circuit, Case No. 22-4056, Brief of Appellee, OAPSE, Document 20, p. 24(citing *Hoekman v. Education Minnesota*, 41 F. 4th 969, 978(8th Cir. 2022)).

Similarly, the Plaintiffs claims going to the validity of their membership contracts with the Union all arise under theories that were ancient in Ohio law before R.C. 4117 was glimmer in the eyes of its drafters. *See e.g. Irwin v. Wilson*, 45 Ohio St. 426 (1887)(recission for mutual mistake); *Curtis v. Factory Site Co.*, 12 Ohio App 148 (8th Dist. 1919) (recission by repudiation); *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E. 2d 923 (1938)(unjust enrichment).

In other words, if R.C. 4117 had never been enacted, the Plaintiffs would still have the same claims under Ohio's common law of contracts. The Plaintiffs' claims, thus cannot be said to "arise from or depend on the collective bargaining rights created by R.C. Chapter 4117." *See Franklin Cnty. Law Enf't, Ass'n*, 59 Ohio St. 3d at 171. Stated in the alternative, the question of whether the Plaintiff's claims "arise or demand on" the collective bargaining statute can be answered by a simple thought experiment: If R.C. 4117 were repealed in its entirety tomorrow,

could the Plaintiffs' claims go forward? Because the membership contracts between the Union and the Plaintiffs could not be legislated out of existence, the answer is plainly yes.

And while the Union posits that the Plaintiffs might have sought relief under R.C. 4117.03(A)(1)'s right to "refrain from . . . assisting" OAPSE, the fact that a statutory remedy might also exist does not oust the Court from jurisdiction:

> Where a statute which creates a new right, prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option.

Fletcher v. Coney Island, Inc. 165 Ohio St. 150, 154, 134 N.E. 2d 371 (1956)(quoting *Zanesville v. Fannan* (1895), 53 Ohio St. 605, 42 N.E. 703, at paragraph two of the syllabus, (1895)). Public sector unions have insisted, in cases like *Belgau* and *Littler*, that opt-out disputes are matters of private contract law between the member-employee and the union. The Plaintiffs here have thus sought to pursue their private contract remedies, which do not arise from, depend upon, or otherwise implicate R.C. 4117.

C. The Cases OAPSE Cites Are Inapposite

The Union begins its brief by citing *Fletcher v. Coney Island, Inc.* for the proposition that when "the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy." 165 Ohio St. 150, 154, 134 N.E. 2d 371 (1956). The Union will get no argument from the Plaintiffs on that point, which has unarguably been the law in Ohio for decades. But what the Union does not note the paragraph that precedes the cited sentence, which establishes that the creation of an additional statutory remedy for a pre-existing right does not oust the Court from jurisdiction but gives the plaintiff the option of pursuing either route. *See Fletcher*, 165 Ohio St. at 154 ("when a new remedy is given by statute for a right of action existing independent of it,

without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option").

Further, context is important. Read in its entirety *Fletcher* teaches that statutory remedies are exclusive only when the statute creates a new right. In *Fletcher*, the plaintiff was an African-American woman who sued the defendant amusement park for racial discrimination under Ohio's civil rights statutes. Those statutes subjected amusement park operators who barred citizens on the basis of race to fines and potential imprisonment, as well as civil damages, but did not provide for injunctive relief[2]. But rather than seeking the remedies expressly provided by the statutes, Ms. Fletcher sought an injunction to prevent the park from refusing to admit her in the future. *Id.* at 154. The Court held that because "the General Assembly granted by the enactment of Section 12940, General Code, new rights and provided two remedies or penalties and only two for their violation," it could not provide the injunctive relief requested. *Id.* at 155.

The key question, again, is whether the statute creates a *new* right or cause of action or simply provides an additional remedy for an existing right. Sadly, as in the federal system, Ohio had no common law protections against racial discrimination by a private entity[3]. Prohibitions against and remedies for racial discrimination thus had to be created by statute. Unlike Ms. Fletcher's request for an injunction to prohibit continued racial discrimination—a concept that had no common law antecedent—the Plaintiffs here can point to black-letter contract law that existed long before R.C. 4117's enactment. Since the rights they are seeking are new or statutorily created,

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[2] The statutes were essentially the Ohio Public Accommodations Law of 1884, re-enacted in 1953 when the General Assembly recodified the old General Code into the current Ohio Revised Code.

[3] Although subsequent civil rights statutes have rendered the question moot, as a point of historical interest, Ms. Fletcher apparently argued that she did in fact have a common law right to the judicial remedy she sought under the Ohio Constitution. Modern courts might well have agreed with her and decided *Fletcher* differently.

there is no SERB preemption. Stated another way, the unionization of public sector employees in Ohio began decades before the enactment of R.C. 4117 in 1983. *See* Calvin William Sharpe, *The Ohio Public Sector Collective Bargaining Law: First Anniversary Colloquium*, Case W. Res. L. Rev. 345, 346-47 (1985). Those public employees who entered into contracts with their unions before R.C. 4117's enactment would obviously have had the same common law contractual rights that the Plaintiffs seek to vindicate here.

Next, the Union points out that SERB has heard similar (through by no means identical) cases relating to union resignation and payment of dues. *See, e.g. Koch v. OAPSE*, No. 2023-ULP-01-0006 (Ohio SERB Mar. 9, 2023). But it does not follow that because SERB has exercised jurisdiction in similar cases that its jurisdiction is therefore exclusive. As discussed above, SERB has concurrent jurisdiction to hear complaints related to public workplaces. *Franklin Cnty. Law Enf't, Ass'n*, 59 Ohio St. 3d at 171. Claimants can choose either route. *Id.*; *see also*, *Ohio Assn. of Pub. School Emps./AFSCME Local 4, AFL-CIO v. Madison Local School Dist. Bd. of Edn.*, 11th Dist. No. 2009-L-148, 190 Ohio App.3d 254, 2010-Ohio-4942, 941 N.E.2d 834, ¶ 47 ("It is well established that if a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may be properly heard in common pleas court.") But its *exclusive* jurisdiction applies only to cases arising from collective bargaining agreements or the rights created by R.C. 4117. This case involves neither.

Further, SERB has no authority to determine this Court's jurisdiction nor are its decisions entitled to any deference from this Court. The Ohio Supreme Court made this clear in last years decision in *TWISM Enterprises, LLC v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio 4677, where it held that "it is never mandatory for a court to defer to the judgment of an administrative agency." 2022-Ohio-4677 at ¶42.

But regardless of what precedential value or deference this Court might assign to a SERB decision, the Union's reliance on *Koch* is misplaced because in *Koch*, the Board essentially found that enforcing a contractual opt-out window was not an unfair labor practice, but the Union's refusal to honor a request within the window would be. *See Koch*, 2023-ULP-01-006 ("Mr. Koch did not provide sufficient information or documentation to show that he submitted his dues revocation authorization during the contractual time period . . ."). In other words, according to SERB's decision in *Koch*, in a case like this, where the Plaintiffs admit that they submitted their opt-out request outside of the contractual window, there is no unfair labor practice claim.

The Union relies heavily on *State ex. Rel. Cleveland v. Sutula*, 127 Ohio St. 3d 131, 937 N.E. 2d 88 (2010). In that case, the City of Cleveland sought a writ of prohibition to prevent Sutula, a Cuyahoga County judge, from exercising jurisdiction over a labor dispute where the union claimed that the city had violated employees collective bargaining rights by "refusing to bargain collectively with the union [and] by ignoring a valid collective-bargaining agreement." *Id.* at 133. These issues, of course, fall squarely within SERB's exclusive jurisdiction over statutorily created collective-bargaining rights and the enforcement of a collective-bargaining agreement. As discussed at length, the Plaintiffs' facts are much different and deal only with each Plaintiff's private contractual relationship with the Union.

Lastly, the Union's reliance on a 1976 Pennsylvania Supreme Court case—*Hollinger v. Department of Welfare*, 469 Pa. 358, 365 A. 2d 1245 (1976)— provides no assistance. First, that case was decided long before *Janus* and *Belgau* changed the contours of public employment law. Second, there is no indication that the Pennsylvania plaintiffs raised any of the contract issues raised here. Instead, they simply sought an injunction, the basis for which is unclear. Again, in this case, the Plaintiffs are not disputing that their membership contracts limited the times when they

could opt-out, they are disputing whether those contracts were valid and if so, whether the continued deduction of dues is an unenforceable penalty for their breach of that membership contract. Finally, Ohio law is well-developed, and more importantly, controlling.

IV. CONCLUSION

OAPSE can't have it both ways. If its membership agreements with employees are private contracts, then state contract law should govern them. Again, if R.C. 4117 were repealed in its entirety tomorrow, the Plaintiffs' claims would still exist under Ohio common law. Therefore, those claims neither arise from nor depend on R.C. 4117. As such, SERB does not have exclusive jurisdiction over them and this Court may proceed to hear this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Plaintiffs' Memorandum Contra To Defendant's Motion To Dismiss was served on all counsel record by the Court's electronic filing system, this 23rd day of June, 2023.

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One of the Attorneys for Plaintiffs