UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLIN MAYCOCK, et al., Plaintiff(s), v. CHRISTOPHER DUGOVICH, et al., Defendant(s).	Case No.: 2:19-cv-00562-TSZ **MOTION TO DISMISS** **Noted for Consideration:** **Friday, July 12, 2019**

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Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), Defendants American Federation of State, County, and Municipal Employees Union ("AFCSME"), the Washington State Council of County & City Employees, AFSCME Council 2 ("Council 2"), and Council 2 President Chris Dugovich (collectively, "Union Defendants") hereby file the following Motion to Dismiss.

INTRODUCTION

Plaintiffs' lawsuit seeks specific information concerning salaries and other compensation provided to certain employees of Council 2, the state-level affiliate of the Plaintiff local unions. *See* First Amended Complaint ¶¶ 1.1, 4.2 (Dkt. 2) ("FAC"). But Plaintiffs have already been provided the information they seek and there is no relief left for this Court to award. Plaintiffs acknowledge that they did not exhaust the Union Defendants' internal processes for resolving disputes such as this and, subsequent to the filing of this lawsuit, AFSCME's Judicial Panel issued a decision directing that Plaintiffs be provided all of the information they seek. Indeed, Council 2 has now made that information available to Plaintiffs.

Plaintiffs nonetheless continue to invoke this Court's jurisdiction to pursue a claim against the Union Defendants under two statutes – the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412 ("LMRDA"). In addition to the fatal absence of Article III jurisdiction due to mootness, those statutes cannot support Plaintiffs' claim for several independent reasons.

First, the LMRA, which applies only to private sector labor relations (with certain narrow exceptions) does not provide a cause of action for public employees, including employees of political subdivisions of a state, such as the individual Plaintiffs and the Plaintiff local unions here. Accordingly, this Court lacks jurisdiction over Plaintiffs' LMRA claim. Moreover, LMRA Section 301, under which Plaintiffs' claim is brought requires that a plaintiff exhaust

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internal union procedures before haling a union defendant into federal court. Plaintiffs have not done so here – and, indeed, it was through the Union Defendants' internal dispute resolution procedures that Plaintiffs ultimately obtained the specific information sought by this lawsuit.

Second, although Plaintiffs cite the LMRDA, they provide no allegations sufficient to support an LMRDA claim. The Ninth Circuit has held that claims premised on an alleged violation of a right provided by a union constitution must be brought under the LMRA, not the LMRDA, which allows a plaintiff to sue to enforce only those specific rights created by the union members' bill of rights established by the LMRDA. Plaintiffs allege no facts touching on any of the rights enumerated by the LRMDA. Additionally, while the LMRDA, which like the LMRA generally applies only to private sector labor relations, would otherwise provide a cause of action against AFSCME (because it has both private and public sector members), it does not support a claim against Council 2, which as Plaintiffs correctly allege is comprised exclusively of public sector workers.

Third, Plaintiffs' claim against Dugovich is entirely redundant of their claim against Council 2, serves no purpose and should be dismissed.

For these reasons, explained in greater detail below, the Court should dismiss Plaintiffs' lawsuit in its entirety.

FACTUAL BACKGROUND

Plaintiffs in this case are two union members (presidents of their respective local unions) and the two local unions they represent. FAC ¶¶ 2.1-2.4. The individual Plaintiffs – Maycock and Komac – are public sector workers, employed by the County of San Juan and the City of Bellingham, respectively. *Id.* Plaintiff Local 1849, for which Maycock serves as President, "consists of non-uniformed county employees of San Juan County." *Id.* ¶ 2.2. Plaintiff Local

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114, for which Komac serves as president, "consists of non-uniformed city employees of Bellingham, Washington." *Id.* ¶ 2.4.

Plaintiffs have sued the state-level affiliate of their local unions, Council 2, which is "an affiliation of local public employee unions," FAC ¶ 2.6, Dugovich, the President and Executive Director of Council 2, *id.* ¶ 2.5, and the international union, AFSCME, with which their local unions are affiliated, *id.* ¶ 2.7.

The facts of this case are straightforward. The sole basis for Plaintiffs' single claim is that they were denied access to specific information concerning compensation paid to certain employees of Council 2. FAC ¶ 1.1 ("This dispute concerns the right of union members to obtain financial information about their union."); *see also id.* ¶ 4.2 (enumerating nine categories of information sought concerning wages, benefits and other compensation provided to four employees of Council 2); ¶ 5.6 (cause of action explaining that "Defendants' refusal to provide the requested information constitutes a breach of contract . . ."). Plaintiffs allege that their right to the requested information originates in the AFSCME constitution, which provides: "Members shall have the right to a full and clear accounting of all union funds at all levels." FAC ¶ 1.1. In particular, Plaintiffs allege that AFSCME constitution creates an enforceable contractual right to requested information. *Id.* ¶¶ 5.2-5.6.

Plaintiffs Maycock and Komac allege that they requested "substantially similar, if not identical information." FAC ¶ 4.6. They further allege that the initial request was denied, *id.* ¶ 4.3; that the denial was appealed to a single-member of AFSCME's Judicial Panel, who denied the appeal, *id.* ¶¶ 4.4-4.5; and that the issue was subsequently appealed to AFSCME's full Judicial Panel, which denied the appeal, *id.* ¶¶ 4.7, 4.10.

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But, in fact, Plaintiffs have already been invited to access the information they seek. Plaintiffs acknowledge that they did not exhaust AFSCME's internal procedures for resolution of disputed issues such as this before filing their Complaint. FAC ¶ 4.11 ("Brother Maycock appealed the decision of the Full Judicial Panel to the International Convention of AFSCME, which will not convene until July of 2020."). In fact, rather than wait for the International Convention, on May 10, 2019, AFSCME's President asked the full Judicial Panel to reconsider its initial decision. Declaration of Christopher Dugovich, Exh. A (May 10, 2019 letter). On June 3, 2019, the Judicial Panel convened to reconsider its initial decision and the parties, including counsel for Plaintiff Maycock, addressed the Judicial Panel. Dugovich Decl. ¶ 4. The next day, the Judicial Panel issued a decision on reconsideration. Dugovich Decl., Exh. B. The Judicial Panel directed that Maycock be provided the specific information he sought (the same information he seeks by this lawsuit), and indicated that "[g]oing forward, it is expected that Council 2 will comply with decision to permit Brother Maycock, and any other requesting member, to review the requested information . . . ." *Id.*[1] Subsequently, Council 2 informed Maycock that the requested information would be made available to him, and informed Komac of the Judicial Panel's decision on reconsideration in Maycock's case stating that other members (such as herself) should be provided similar information. Dugovich Decl. ¶ 6, Exh. C.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(1), a plaintiff must establish a court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In evaluating its jurisdiction, this Court should not "rely simply on the allegations in the

[1] Accordingly, because she requested "substantially similar, if not identical information," FAC ¶ 4.6, the Judicial Panel's decision on reconsideration entitles Plaintiff Komac access to the same information.

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complaint to determine subject matter jurisdiction. [It] must instead look to facts outside the pleadings to determine whether [it] has jurisdiction." *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1043 n.7 (9th Cir. 2010) (citing *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009)); *see also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."). Furthermore, "[n]o presumptive truthfulness attaches to plaintiffs' allegations. Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Robinson*, 586 F.3d at 685 (citations omitted).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the plaintiff's claim for relief. *See Conservation Force v. Salazar*, 646 F.3d 1240, 1242-43 (9th Cir. 2011). In reviewing a 12(b)(6) motion to dismiss, "all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

ARGUMENT

I. Article III Jurisdiction Is Lacking Because Plaintiffs' Claim Is Moot.

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Plaintiffs must establish Article III jurisdiction for each form of relief they seek. *Davis v. FEC*, 554 U.S. 724, 733-34 (2008). Here, Plaintiffs seek "a declaration that they are entitled to the requested information and an order directing Defendants to produce said information." FAC ¶ 6.1. But they have already been invited to access the requested information, Dugovich Decl. ¶ 6, and have obtained a decision from AFSCME's Judicial Panel directing Council 2 to provide "any requesting member" similar information "going forward." Dugovich Decl., Exh. B. Accordingly, there is no existing controversy between the parties and no relief left for this Court to award.

For a federal court to have subject matter jurisdiction over a claim, Article III of the Constitution requires an actual, live controversy between the parties at each stage of the proceedings. *Timbisha Shoshone Tribe v. Dep't of Interior*, 824 F.3d 807, 812 (9th Cir. 2016); *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005) (en banc). For that reason, "even a once-justiciable [claim] becomes moot and must be dismissed 'when the issues presented are no longer "live."'" *Flanigan's Enters., Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017) (en banc) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)), *cert. denied sub nom. Davenport v. City of Sandy Springs*, 138 S. Ct. 1326 (2018). "Put another way, a [claim] becomes moot when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016) (quoting *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015)) (quotations omitted), *cert. denied*, 137 S. Ct. 828 (2017).[2]

[2] These principles apply with equal force in a declaratory judgment action. *See, e.g., Gator.com*, 398 F.3d at 1129 (Article III case or controversy requirement is "not relaxed in the declaratory judgment context"; accordingly, a declaratory judgment claim is moot if "changes

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Here, Plaintiffs ask this Court for no relief other than a declaration establishing their right to the requested information and an injunction directing Council 2 to provide them the requested information.[3] But because Plaintiffs have already obtained all of the relief they seek by this lawsuit, *see supra* at 6, no live controversy exists between the parties. *See Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1031 (9th Cir. 2018) ("We further agree with . . . [defendants] that this claim is moot as there is no effective relief available to [plaintiff]; it has obtained all that it sought with this claim."). Thus, this Court lacks jurisdiction and Plaintiffs' claim should be dismissed as moot.

II. Section 301 Provides Plaintiffs No Basis For Federal Jurisdiction And, Regardless, Plaintiffs Have Not Satisfied The Prerequisite For Such A Claim.

A. Section 301 Does Not Provide a Cause of Action for Public Sector Employees or Purely Public Sector Unions Such as Plaintiffs.

In addition to the insurmountable problem that Article III jurisdiction is lacking because of mootness, Plaintiffs' claim should be dismissed for the alternate, independent reason that the

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in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief") (citations and quotations omitted).

[3] Derivative to the declaratory and injunctive relief they seek, Plaintiffs also ask for "an award of costs and Attorney's fees based upon the common benefit doctrine or as may otherwise be allowed by statute, at law, or in equity." FAC ¶ 6.2. But Plaintiffs have obtained no relief meriting application of the common benefit doctrine, nor is there a common fund from which such fees could be awarded. *See Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1981) (describing common benefit doctrine). Nor have Plaintiffs achieved a result that would entitle them to "prevailing party" status, much less established the other requirements for fee-shifting under the LMRDA or LMRA. *See Higgins v. Harden*, 644 F.2d 1348, 1352 (9th Cir. 1981) (fees under LMRDA may be awarded to "prevailing party" in limited circumstances); *Wellman v. Writers Guild of Am., West, Inc.*, 146 F.3d 666, 674 (9th Cir. 1998) (same under LMRA). And, of course, federal law does not permit fee-shifting on the basis of a "catalyst" theory. *See Buckhannon Bd. And Care Home, Inc. v. W. Vir. Dept. of Health and Human Res.*, 532 U.S. 598, 600 (2001).

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statutory basis asserted–LMRA Section 301–does not provide them a cause of action and, thus, provides no basis for federal jurisdiction.

The primary basis for Plaintiffs' lawsuit is Section 301 of the LMRA, which permits lawsuits "for violation of contracts between an employer and a labor organization . . . as defined in this chapter, or between any such labor organizations." 29 U.S.C. § 185(a). The Supreme Court has held that, insofar as they structure relationships between affiliated unions, a parent union's constitution is contract "between . . . labor organizations," and that when individual union members are the intended beneficiaries of such inter-union contracts they "may bring suit on these contracts under § 301." *Wooddell v. Int'l B'hood of Elec. Workers, Local 71*, 502 U.S. 93, 101 (1991). This rule is limited, however, by the reach of the LMRA and Section 301.

The LMRA adopts the National Labor Relations Act's ("NLRA") definitions of "employee," "employer," and "labor organization." 29 U.S.C. § 142. In turn, the NLRA expressly *excludes* from the definition of "employer" public employers, including "any State or political subdivision thereof." 29 U.S.C. § 152(2). Thus, public employees are also excluded from the NLRA's (and LMRA's) definition of "employee." *Id.* § 152(3) ("The term 'employee' . . . shall not include any individual employed . . . by any other person who is not an employer as herein defined."). Similarly, unions representing exclusively public sector workers are not "labor organizations" within the meaning of the NLRA and LMRA. *See id.* § 152(5) ("labor organization" means "any organization of any kind . . . in which *employees* participate and which exists for the purpose, in whole or in part, of dealing with *employers*.") (emphasis added). The Ninth Circuit has observed that "[b]y the plain, unambiguous language of the LMRA, the definition of 'labor organization' excludes an organization of employees of a political

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subdivision of a state." *Pac. Maritime Ass'n v. Local 63, ILWU*, 198 F.3d 1078, 1081 (9th Cir. 1999).

Recognizing this limitation, the Ninth Circuit has held that the cause of action provided by Section 301 of the LMRA is unavailable to public employees. In *Ayres v. International Brotherhood of Electrical Workers*, 666 F.2d 441 (9th Cir. 1982), the Ninth Circuit considered a claim brought by a county employee against, *inter alia*, his local union and its international affiliate alleging a breach of the defendants' duty of fair representation. Noting that "[p]olitical subdivisions of states are expressly excluded from the definition of 'employer,'" *id.* at 442, the appellate court rejected the plaintiff's arguments for an interpretation of the LMRA that would expand its coverage to public employees. The court reasoned that "[h]ad it been the intent of Congress to extend the protections of section 301(a) to public employees, we believe that purpose would have been stated more clearly." *Id.* at 443. In no uncertain terms, the Ninth Circuit concluded: "We hold that section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court jurisdiction over the claims of an individual employed by a political subdivision of a state." *Id.* at 444.

This rule has been applied uniformly across circuits. *See, e.g.*, *Ford v. D.C. 37, Union Local 1549*, 579 F.3d 187, 188 (2d Cir. 2009) ("As the language of the LMRA makes plain, public employees are not covered by that statute."); *Strasburger v. Bd. of Educ.*, 143 F.3d 351, 360 (7th Cir. 1998) ("Since the School Board is not an 'employer' and [plaintiff] is not an 'employee,' §185(a) provides no federal basis for his claim."); *Crilly v. Se. Penn. Transp. Auth.*, 529 F.2d 1355, 1357 (3d Cir. 1976) ("We find that SEPTA is a political subdivision of the Commonwealth of Pennsylvania and therefore excluded from the coverage of both Acts, [the NLRA and LMRA]"); *Cunningham v. Local 30, Int'l Union of Operating Engineers*, 234

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F.Supp.2d 383, 395 (S.D.N.Y. 2002) ("[C]ourts have consistently held that public employees cannot bring claims under NLRA and LMRA provisions.").

Additionally, just as Section 301 provides no cause of action to public employees, neither does it provide a cause of action for unions representing exclusively public sector employees. *See Hudson v. Am. Fed. of Gov't Empl.*, 318 F.Supp.3d 7, 14 (D.D.C. 2018) ("Courts have thus uniformly held that, because a public-sector union is not a 'labor organization' under the LMRA, it may not bring a § 301 claim, and neither may public employees.").[4] Because the two plaintiff local unions – Locals 1849 and 114 – are comprised exclusively of public employees, FAC ¶¶2.2, 2.4, Section 301 does not provide them a cause of action any more than it does for the public employees those local unions represent. *See Johnson v. City of Monroe*, 2007 WL 1791211, at *2 (W.D. La. June 18, 2007) ("[O]ther courts have concluded that, if an employer is exempt under the LMRA and NLRA, then neither its employees nor union are covered under the LMRA and NLRA.").[5]

The *Cunningham* case is remarkably similar to this case. There, the plaintiffs were public employees who alleged that their union had, *inter alia*, violated the constitution of its parent international union. 234 F.Supp.2d at 395. There, as here, the parent union was comprised of local unions representing both public and private sector workers. *Id.* The court surveyed

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[4] In *Hudson*, the district court held that the plaintiff could bring a Section 301 claim against a "mixed union" comprised of both public and private sector workers because the plaintiff himself was a private sector worker. *Hudson*, 318 F.Supp.3d at 14 ("Hudson, however, is *not* a public employee but was, until his ouster, a full-time AFGE employee.") (emphasis in original).

[5] Any claim by the Plaintiff local unions fails for the additional reason that the provision of the AFSCME constitution Plaintiffs invoke guarantee union *members*, not local unions, a right to access certain information. *See* FAC ¶ 1.1 ("*Members* shall have the right to a full and clear accounting of all union funds at all levels.") (emphasis added); *id.* ¶¶ 5.2-5.6 (explaining contractual basis for Plaintiffs' claim).

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decisions from numerous courts, concluding "[t]hese rulings that public employees may not sue under NLRA and LMRA support the view that these laws do not cover public employee claims in the present situation – even though . . . [the union defendant] represents both public and private employees." *Id.* at 396; *see also Rosenthal v. Roberts*, No. 04-cv-5205, 2005 WL 221441, at *6 (S.D.N.Y. Jan. 28, 2005) ("[S]everal courts within this District have dismissed cases on the grounds that federal district courts lack jurisdiction under Section 301 over public employees' claims, irrespective of who the defendants are."). The court therefore dismissed for lack of subject matter jurisdiction the claim that the defendants had violated the union constitution. *Cunningham*, 234 F.Supp.2d at 396.

Here, the First Amended Complaint alleges that the individual Plaintiffs are public employees and the Plaintiff local unions are comprised of public employees. FAC ¶¶ 2.1-2.2 (Maycock is a member of Local 1849, "a labor union that consists of non-uniformed county employees of San Juan County"); *id.* ¶¶ 2.3-2.4 (Komac is a member of Local 114, "a labor union that consists of non-uniformed city employees of Bellingham, Washington"). As such, under controlling Ninth Circuit authority, "section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court jurisdiction over [Plaintiffs' claim]," *Ayres*, 666 F.2d at 444, and Plaintiffs' Section 301 claim must be dismissed.

B. Plaintiffs Failed to Satisfy Section 301's Exhaustion Requirement

Even if Plaintiffs' claim were not moot, and even if subject matter jurisdiction existed under Section 301, Plaintiffs' claim should be dismissed for the additional reason that they each failed to exhaust internal union remedies before filing suit. Where "internal union procedures are capable of fully resolving meritorious claims short of the judicial forum," "exhaustion of internal remedies could result in final resolution of [the dispute] through private rather than

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judicial avenues." *Clayton v. Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am.*, 451 U.S. 679, 692 (1981). Accordingly, employees must exhaust internal union procedures prior to bringing suit under §301. *Id.* As with any other claim, dismissal under Rule 12(b)(6) is appropriate when a plaintiff's failure to exhaust is "clear on the face of the complaint." *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014).

Here, Plaintiffs have pled their failure to exhaust internal union procedures. Plaintiffs' FAC alleges that, "On April 15, 2019, Brother Maycock appealed the decision of the Full Judicial Panel to the International Convention of AFSCME, which will not convene until July of 2020." Complaint ¶ 4.11. Plaintiff Maycock's failure to pursue his appeal to the International Convention constitutes failure to exhaust that precludes bringing a § 301 action. *See Lynn v. Sheet Metal Workers' Int'l Ass'n*, 804 F.2d 1472, 1483 n. 11 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 109 S. Ct. 639, 102 L. Ed. 2d 700 (1989) (plaintiff failed to exhaust where constitution provided right to appeal within the union and ultimately to the general convention and plaintiff made no showing that those procedures were inadequate or of unreasonable delay); *Willetts v. Ford Motor Co.*, 583 F.2d 852, 855 (6th Cir. 1978) (failure to appeal to Constitutional Convention constituted failure to exhaust); *Cent. Massachusetts Area Local, Am. Postal Workers Union v. Am. Postal Workers Union, AFL-CIO*, 704 F. Supp. 305, 308 (D. Mass. 1988) (rejecting contention that appeal to union's National Convention was an "empty right" and dismissing complaint for failure to exhaust internal appeal procedures).

Moreover, Plaintiff Maycock cannot establish that having his appeal heard in July 2020 would constitute an unreasonable delay such that § 301's exhaustion requirement may be waived. *See Wiggins v. Chrysler Corp.*, 728 F. Supp. 463, 467 (N.D. Ohio 1989), *aff'd*, 905 F.2d 1539 (6th Cir. 1990) (fact that employee spent 18 months pursuing internal union appeal did not

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constitute an unreasonable delay for purposes of § 301 exhaustion requirement); *Cent. Massachusetts Area Local, Am. Postal Workers Union v. Am. Postal Workers Union, AFL-CIO*, 704 F. Supp. 305, 309 (D. Mass. 1988) (delay of one year from union's last action until national convention not unreasonable).

Moreover, Plaintiff Komac has not even begun to exhaust her internal union remedies. The FAC tellingly does not include any allegation that Komac filed an internal appeal to Council 2, much less appealed any initial decision to the Judicial Panel. *C.f.* FAC ¶ 4.4 ("Brother Maycock then filed an internal appeal to Council 2…"). It is clear from the face of the FAC that Plaintiff Komac has not even initiated, much less exhausted, her internal union remedies.

Section 301's exhaustion requirement serves the interest of judicial economy because as the Supreme Court has noted, where a union's internal procedures could provide an employee with the full relief he requested, "his § 301 action would become moot, and he would not be entitled to a judicial hearing." *Clayton,* 451 U.S. at 692. Plaintiffs' failure to exhaust in this case has led to precisely this situation. The Union Defendants' internal processes continued to play out after Plaintiffs filed their complaint and, upon reconsideration (and a hearing at which Plaintiff Maycock participated though his counsel), the Judicial Panel issued a decision directing Council 2 to provide Maycock and any other requesting member the requested information, i.e., the same relief Plaintiffs seek from this Court. *See supra* at 6; Dugovich Decl. ¶ 6.

Plaintiffs' failure to exhaust provides yet another basis for dismissal of their Section 301 claim.

III. Plaintiffs Have Failed to State an LMRDA Claim.

A. Plaintiffs Have Failed to State an LMRDA Claim.

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Although Plaintiffs assert only a single cause of action, they identify two distinct statutory bases for their claim – the LMRA and LMRDA. FAC ¶¶ 3.1, 5.6. As explained below, however, the rights created by these statutes differ in important ways. Plaintiffs' invocation of the LMRDA is an afterthought, and they make no effort to plead a cognizable LMRDA claim, alleging no facts supporting such a claim. To the extent that the Court construes Plaintiffs' single cause of action to state a distinct LMRDA claim, that claim should be dismissed.

As with any other claim, to state an LMRDA claim Plaintiffs must allege facts "plausibly" supporting Defendants' liability under that statute. *Iqbal*, 556 U.S. at 678. Plaintiffs have failed to do so.

Title I of the LMRDA, entitled "Bill of Rights of Members of Labor Organizations," establishes rights guaranteeing union members: (i) "equal rights," 29 U.S.C. § 411(a)(1), (ii) "freedom of speech and assembly," *id.* § 411(a)(2), (iii) limits on increased "dues, initiation fees, and assessments," *id.* § 411(a)(3), (iv) "protection of the right to sue," *id.* § 411(a)(4), and (v) "safeguards against improper disciplinary action," *id.* § 411(a)(5). In turn, Section 102 of the LMRDA provides that "[a]ny person whose rights secured [by Title I] have been infringed" may bring a civil action in federal district court. *Id.* § 412. Thus, the LRMDA's cause of action exists only to enforce the specific rights created by the LMRDA.

By contrast, in *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463 (9th Cir. 1992), the Ninth Circuit explained that "failure to follow the union's internal rules . . . constitutes a violation of the union's obligations to its members, and is actionable as a breach of contract under section 301(a) of the [LMRA]," *not the LMRDA*. *Id.* at 1466. In *Ackley*, the plaintiffs were union members and shop stewards who alleged that their union had failed to "make a full disclosure of all of the terms and provisions of a collective bargaining agreement prior to

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submitting the agreement to the union membership for ratification." *Id.* The Ninth Circuit affirmed dismissal of plaintiffs' LMRDA claims because plaintiffs' allegations did not implicate any of the rights enumerated by the LMRDA. *Id.* at 1473-76. The appellate court noted that "[u]nless union members allege a denial or infringement of a specific right provided them in the LMRDA, it is [Section 301 of the LMRA] . . . that they must pursue when they contend that rights guaranteed them by their union's constitution or bylaws have been infringed." *Id.* at 1477.

This rule is well-established. *See, e.g.*, *Mallick v. Int'l B'hood of Elec. Workers*, 749 F.2d 771, 786 (D.C. Cir. 1984) (in order to state LMRDA claim a union member "must be able to ground his claims on a violation of a specific right enumerated in subsection 101(a)"); *United Transp. Union Local 1585 v. United Transp. Union Int'l*, No. 93-cv-457S, 1994 WL 29831, at *5 (W.D.N.Y. Jan. 19, 1994) ("[F]ederal courts have no power under the LMRDA to enforce the terms of a union constitution, unless those terms have applied in such a way as to deprive union members of specific rights secured by the LMRDA.").

Here, Plaintiffs allege no facts even suggesting a violation of any of the enumerated rights guaranteed by the LMRDA, much less "plausibly" establishing a basis for liability. *Iqbal*, 556 U.S. at 678. Rather, Plaintiffs unambiguously allege that "[t]his dispute concerns the right of union members to obtain financial information about their union," and that this right arises from the AFSCME Constitution. FAC ¶ 1.1. Plaintiffs' cause of action is premised on the allegations that "[u]nion constitutions are contracts between labor organizations and their members," *id.* ¶ 5.2, "AFSCME's Constitution constitutes a valid, binding, and enforceable contract between Plaintiffs and Defendants," *id.* ¶ 5.3, "AFSCME's Bill of Rights for Union Members, contained within the AFSCME Constitution, [provides a right to] . . . a full and clear

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accounting of all union funds at all levels," *id.* ¶ 5.4, and "Defendants' refusal to provide the requested information constitutes a breach of contract . . . ," *id.* ¶ 5.6.

Plaintiffs make no allegation that they were treated differently than other union members. *See Ackley*, 958 F.2d at 1473 ("Section 101(a)(1) is an anti-discrimination provision, pure and simple. To state a claim under section 101(a)(1), a union member must allege a denial of rights accorded to other members."). Nor do they allege that Defendants violated their rights of free speech and assembly, or any other right guaranteed by the LMRDA. Plaintiffs allege only that they were denied access to specific information concerning compensation paid to certain union employees, and that they were entitled to this information under the Union's constitution. FAC ¶¶ 1.1, 4.2, 5.1-5.6. This claim does not fall within the scope of the LMRDA. *See Ackley*, 958 F.2d at 1477.

As such, Plaintiffs have failed to "plausibly" state an LMRDA claim. *Iqbal*, 556 U.S. at 678. If the Court chooses to construe Plaintiffs' single cause of action to state a distinct LMRDA claim, that claim should be dismissed.

B. Council 2 Is Not Subject To The LMRDA

The LMRDA confers jurisdiction upon district courts to hear and adjudicate civil actions brought by union members against "labor organizations." 29 U.S.C. § 412. But a labor organization comprised exclusively of public-sector employees is not a "labor organization" under the statute. *See* 29 CFR § 451.3(a)(4); *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996) ("A labor organization composed entirely of public sector employees is not a labor organization for the purposes of the LMRDA."); *see also Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994). The Ninth Circuit has made clear that courts should dismiss a complaint brought under the LMRDA against such an organization. *See Thompson*, 99 F.3d at 354.

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As Plaintiffs accurately allege, Council 2 is comprised of local unions exclusively representing local public employees. FAC ¶ 2.6 (Council 2 "is an affiliation of local public employee unions in Washington and Idaho"). The Council is therefore "composed entirely of public-sector employees," and is excepted from the definition of "labor organization" under the LMRDA. *Thompson*, 99 F.3d at 354. This is so notwithstanding the fact that its international affiliate, AFSCME, may be subject to the Act. *See Commer v. McEntee*, 145 F. Supp.2d 333, 338 (S.D.N.Y. 2001) (*aff'd in part, rev'd in part Commer v. Giuliani*, 34 F. Appx. 802 (2nd Cir. 2002)) (the LMRDA does not apply to labor organizations representing purely public sector employees even where the international bodies with which the organization affiliates are subject to the Act).[6] Because Council 2 is not a "labor organization" within the LMRDA's definition of that term, the statute does not confer jurisdiction over any LMRDA claim against Council 2 that the Court may read into Plaintiffs' FAC.

IV. Plaintiffs' Claim Against Dugovich Is Redundant And Should Be Dismissed.

A. Courts Routinely Dismiss Claims Against Individual Defendants Sued In Their Official Capacity When The Plaintiff Has Also Sued The Entity On Whose Behalf The Individual Defendant Was Officially Acting.

In *Kentucky v. Graham*, the Supreme Court observed that the distinction between suits brought against defendants in their *official* capacity and those brought against defendants in their *individual* capacities had "continue[d] to confuse lawyers and confound lower courts." 473 U.S. 159, 165. The Court clarified that "[o]fficial-capacity suits . . . 'generally represent only another

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[6] To be sure, unlike the LMRA, public employees may bring claims against "mixed unions" (i.e., unions representing both public and private sector employees) under the LMRDA. *See, e.g., Cunningham*, 234 F.Supp.2d at 391 (holding that, while public employees may not sue under the LRMA, "[a] union that represents both private and public sector employees is subject to the LMRDA, even if the member brining suit is a public employee."). But, as described above, Plaintiffs have failed to allege facts supporting such a claim against any defendant. In particular, they have no basis for such a claim against AFSCME because AFSCME was involved in their dispute only at the stage of appeal to the International's Judicial Panel, the body that ultimately directed that Plaintiffs be provided the information they seek.

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way of pleading an action against an entity of which an officer is an agent.'" *Id.* (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 660 n. 55 (1978)). "[A]n official-capacity suit is, in all respects other than the name, to be treated as a suit against the entity." *Id.* The Court explained further that an official-capacity suit "is *not* a suit against the individual personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his *personal* capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an *official-capacity* suit must look to" the entity itself. *Id.* (emphasis added).

Because official-capacity suits are, in effect, suits against "the entity of which an officer is an agent," and because plaintiffs in these suits actually seek to recover from the entity and not the agent, courts routinely dismiss claims against individuals in their official capacity when the plaintiff also names the entity as a defendant on the ground that the claims are duplicative and redundant. *See Cntr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't.*, 533 F.3d 780, 799 (9th Cir. 2008) ("When both a municipal officer and a local government are named, and the officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant."); *Robinson v. District of Columbia*, 403 F.Supp.2d 39, 49-50 (D.D.C. 2005) (courts have "routinely dismissed corresponding claims against individuals named in their official capacity as 'redundant and an inefficient use of judicial resources'").

Courts have applied the principle enunciated in *Graham* to dismiss claims against union officers in their official capacity when the plaintiff has also named the union as a defendant. *See, e.g., Crowne Investments, Inc. v. UFCW, Local 1657*, 959 F.Supp. 1473, 1479 (M.D. Ala. 1997) (dismissing § 301 claims against union president on the ground that "[s]ince Local 1657 is sued, it would be redundant and unnecessary to also sue its president in an official capacity"); *Wabnum*

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v. Snow, No. 97-4101-SAC, 2000 WL 1863456, at *3 (D. Kan. Oct. 20, 2000) ("Because it is the union and not [its president] that will bear the liability, if any, for the alleged violations of law, [the president's] presence in her official capacity as President of Local 6401 is unnecessary to plaintiff's potential relief, and she will be dismissed."); *Webb v. SEIU Local 73*, No. 02 C 3279, 2002 WL 31049841, at *6 (N.D. Ill. Sept. 13, 2002) (dismissing as redundant claims brought against union and county officials where plaintiff also named union and county as defendants).

B. Plaintiffs' Claim Against Dugovich In His Official Capacity Has No Basis and Is Improper.

Where, as here, a plaintiff has not indicated whether he is suing a defendant personally or as an agent of an entity, courts look to "the course of proceedings" to determine in which capacity the defendant has been sued. *See Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1123 (9th Cir. 2007); *Banks v. Slay*, 196 F. Supp.3d 1021, 1032 (E.D. Mo. 2016) (although the plaintiffs "did not expressly allege that they were suing the director in his official capacity, the course of proceedings made it clear the action was against him in his official capacity"). In looking to the "course of proceedings" courts "consider such factors as the nature of plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint." *Young Apts., Inc. v. Town of Jupiter FL*, 529 F.3d 1027, 1047 (11th Cir. 2008).

In examining the course of proceedings here, it is clear that Plaintiffs have sued Dugovich in his official rather than his personal capacity. The crux of Plaintiffs' complaint is that Council 2, of which Dugovich is the President and Executive Director, failed to provide them with information it was obligated under the union's constitution to provide. *See* FAC ¶ 1.1.

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Plaintiffs do not allege that Dugovich was personally involved in processing their requests.[7] Even had they done so, any obligation Dugovich had to act upon the requests derived *purely* from his position as a Council 2 officer. *See Michael M. v. Bd. of Evanston Tp. High Sch. Dist. No. 202*, 2009 WL 2258982, at *2 (N.D. Ill. July 29, 2009) (dismissing claims against individual defendants as redundant where the individuals' legal duties derived from the duties of the entity of which they were agents).

Plaintiffs' alleged cause of action and prayer for relief further evince the fact that the real party in interest is Council 2, not Dugovich. Through their complaint, Plaintiffs allege that Defendants violated the terms of the AFSCME constitution, which they assert "constitutes a breach of contract and is remedial by the LMRA and/or LMRDA." FAC ¶ 5.6. To the extent Plaintiffs' claim is cognizable under Section 301 of the LMRA, the Supreme Court in *Atkinson v. Sinclair Refining Co.*, has made clear that union members and officials may not be held individually liable in suits brought under that statute. 370 U.S. 238, 248-49 (1962); *see also* 29 U.S.C. § 185(b) ("Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.").

Moreover, the Plaintiffs make no claim for either compensatory or punitive damages against Dugovich. They instead seek "a declaration that they are entitled to the requested information and an order directing Defendants to produce said information to Plaintiffs." FAC ¶ 6.1. If this Court were to grant Plaintiffs the relief they seek and compel Council 2 to produce

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[7] Apart from Plaintiff's allegation that he requested from Dugovich "information concerning Dugovich, Executive Director of Council 2; J. Pat Thompson, Deputy Director of Council 2, Audrey Eide, Legal Counsel for Council 2, and Barbara Corcoran, Business Manager of Council 2," the Complaint is completely devoid of any other allegations related to Dugovich.

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the information, it would be the obligation of Council 2—not Dugovich personally—to comply with the order. That Dugovich could potentially be involved in producing the information if such an order were to issue is of no consequence; his involvement would solely be by virtue of his position as a Council 2 official. *See Michael M.*, 2009 WL 2258982, at *2.

Because the gravamen of Plaintiffs' complaint centers upon Council 2's alleged failure to uphold its obligations under the union constitution, and because Plaintiffs have not alleged any facts suggesting that Dugovich engaged in any wrongdoing nor have they sought to recover damages from Dugovich personally, Plaintiffs have sued Dugovich in his official, rather than his individual capacity. Moreover, because Plaintiffs have also sued Council 2, the entity of which Dugovich is an agent, their sole means of recovery is through Council 2. *See Graham*, 473 U.S. 159 at 165. Plaintiffs' claim against Dugovich is redundant and should therefore be dismissed. *See Cotton v. District of Columbia*, 421 F.Supp.2d 83, 86 (D.D.C. 2006) (dismissing plaintiffs "duplicative official-capacity suit against defendant" for failure to state a claim "because she is suing an individual from whom she cannot recover").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' First Amended Complaint be dismissed in its entirety. Because the Court lacks subject matter jurisdiction over Plaintiffs claim, and any amendment would be futile, Plaintiffs' First Amended Complaint should be dismissed with prejudice. *See Swartz v. KPMG*, 476 F.3d 756, 761 (9th Cir. 2007) ("The claim was properly dismissed with prejudice because amendment would be futile.").

Dated this 14th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the date noted below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLIN MAYCOCK, et al., Plaintiff(s), v. CHRISTOPHER DUGOVICH, et al., Defendant(s).	Case No.: 2:19-cv-00562-TSZ [PROPOSED] ORDER GRANTING WSCCCE COUNCIL 2'S MOTION TO DISMISS

This matter comes before the Court on Defendants' Motion to Dismiss. Dkt. No.14. Having considered the parties' motion, opposition, accompanying declarations, and the record as a whole, the Court hereby ORDERS:

1. Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED on this ____ day of _____, 2019.

The Honorable Thomas S. Zilly
United States District Court Judge

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