

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DANIEL B. LOCKE, et al.)
)
 Plaintiffs,)
)
 v.)
) Case No. 2:05-cv-00112-GZS
 EDWARD A. KARASS, STATE)
 CONTROLLER, et al.)
)
 Defendants.)
)

**MEMORANDUM IN RESPONSE TO PLAINTIFFS’
RENEWED MOTION FOR CLASS CERTIFICATION
AND APPOINTMENT OF CLASS COUNSEL**

In response to the Court’s order denying their prior motion, on November 23,
2005 Plaintiffs renewed their motion to certify a class in this action, to consist of:

all State of Maine employees employed in the Administrative,
Professional & Technical, Supervisory Services, and Operations,
Maintenance, and Support bargaining units who were or are
represented exclusively for purposes of collective bargaining by
MSEA and who were or are subject to demands for payment of
union dues or “service” fees to MSEA as a condition of continued
State employment.

Plaintiffs’ Memorandum of Points and Authorities in Support of their Renewed Motion
for Class Certification and Appointment of Class Counsel (Docket No. 55) (hereinafter
“Pls. Renewed Mot.” or “renewed motion”) at 1-2.

Defendant Maine State Employees Association (“MSEA”) opposed Plaintiffs’
prior motion for class certification to the extent that they sought to include in the class
employees who chose to join MSEA as *members*, and who are paying full union dues and
receiving the benefits of union membership. Plaintiffs’ renewed motion continues to

define the proposed class to include current union members.¹ Indeed, the proposed class would include two distinct groups of union members, neither of which is appropriate given Plaintiffs' claims in this case. The first group of current union members encompassed by the proposed class definition consists of those bargaining unit employees who were nonmembers as of April 2005, when MSEA distributed the first fair share notice to nonmembers relevant to the collection of fees for the fair share year beginning July 2005, and who became dues-paying members since that time, and remain so today. The second group of current union members swept within the proposed class definition consists of those bargaining unit employees who had been nonmembers subject to fair share fee provisions under the applicable *2003-2005 collective bargaining agreement*, but who joined MSEA as dues-paying members prior to April 2005, when the first notice to nonmembers for the July 2005 collection period was distributed.

As we explain, Plaintiffs' interests directly conflict with the interests of union members they seek to include in the proposed class. Moreover, as to the second group of union members identified above—those putative class members who became dues-paying union members prior to April 2005—there is no common question of law between these pre-April 2005 union members and the Plaintiffs, whose claims are based on notices to nonmembers issued *in or after* April 2005. See Plaintiffs' First Amended and/or Supplemental Class Action Complaint (Docket No. 47) (hereinafter "Am. Complaint") at ¶¶ 24-28, 42-46.² The conflicting interests of these 1000-plus union

¹ After the hearing on Plaintiffs' original class certification motion, the parties attempted to reach agreement on a class definition, but were unable to do so.

² Indeed, as we explain below, these "pre-notice" members would not have standing to assert the First Amendment claims alleged by the Plaintiffs, *see infra* at 8; nor are any attempting to do so.

members—which make up nearly one-third of the entire proposed class—preclude certifying a class as defined in Plaintiffs’ renewed motion.³

STATEMENT OF THE CASE

This litigation concerns certain aspects of the process by which MSEA assesses and collects service fees from employees of defendant State of Maine (hereinafter the “State”) who work in bargaining units represented by MSEA, but who have chosen not to become members of the union. Prior to commencing the collection of service fees from nonmember employees for the 2005 collection period, set to commence in late July 2005, MSEA issued three notices pursuant to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (hereinafter collectively the “*Hudson* notices”), informing employees about the service fee collection, providing financial information supporting MSEA’s calculation of the service fee amount, and instructing employees about the procedures for challenging the service fee amount. See Order on Motion for Preliminary Injunction (Docket No. 39) (hereinafter “Order”) at 2-3.

Although the first *Hudson* notice—mailed in April of 2005—calculated a service fee equivalent to 73.8% of member dues, the final *Hudson* notice—mailed in July of 2005, and superceding all prior notices—reduced this service fee to 49.13% of union dues. *Id.* Those members who had joined the union after the original April notice received a special letter in conjunction with the July notice, informing them that they could resign their membership in the union—and pay the newly-reduced service fee,

³ Attached as Exhibit 1 to this Response is the Declaration of Mary Labbe, the MSEA employee who maintains membership, dues, and fee records for the union. According to her records, there currently are 2582 bargaining unit members designated as fee payers and 1092 who are current dues-paying members, but who previously were designated as fee payers. Labbe Decl. at ¶ 4. Because of their former fee payer status, each of these 1092 current members would be included in Plaintiffs’ proposed class.

rather than union dues—if they so desired. Labbe Decl.at ¶ 5 & Exh. A. In addition, pursuant to the terms of MSEA’s collective bargaining agreement with the State, the service fee for nonmember employees who were hired prior to July 2, 2003, and who have not been members of MSEA-SEIU or fee payers since that date (referred to as “grandfathered nonmembers”), is reduced to fifty percent of the otherwise applicable fee amount—in other words, to only 24.57% of member dues—through June 2006. Order at 2-3.

The Plaintiffs in this case are all nonmembers who have brought a putative class action against MSEA and the State, alleging that the three notices provided by MSEA to nonmember employees prior to the commencement of MSEA’s service fee collection did not comply with *Hudson*’s requirements.⁴ Plaintiffs seek, *inter alia*: (1) a permanent injunction prohibiting Defendants from taking any action to collect service fees from nonmember employees; (2) “actual damages in the full amount of agency fees *and/or union dues* deducted from the[] wages [of class members] prior to having been provided with all of the protections required by the Supreme Court in *Hudson*”; and (3) restitution of all agency fees *and/or union dues* collected from members of the Plaintiffs’ purported class, plus interest. Am. Complaint at 16-17 (emphasis added).⁵

⁴ Specifically, Plaintiffs contend that the basis for the service fee is not adequately documented in the notices, Am. Complaint at ¶ 29, that nonmember employees are entitled to a larger “advance reduction” in the amount of the service fee that MSEA proposes to collect, *id.* at ¶ 30, that MSEA has improperly charged nonmembers for expenditures that are not “germane” to collective bargaining, *id.* at ¶ 36, and that the indemnification provision in the contract between MSEA and the State is invalid. *Id.* at ¶ 47.

⁵ Plaintiffs also moved for a preliminary injunction. This Court denied that Motion on July 26, 2005, finding that Plaintiffs were unlikely to succeed on the merits of their constitutional claims under *Hudson* and that Plaintiffs had not demonstrated any irreparable injury. *See* Order at 10-17.

Given the proposed class definition, the class that Plaintiffs purport to represent includes: (1) “grandfathered” nonmembers of the union who, like all of the named Plaintiffs, have never been members of the union, and are subject only to the 24.57% service fee through June of 2006; (2) nonmembers of the union who became employees after July 2, 2003, and are accordingly subject to the 49.13% service fee; and (3) current *members* of the union who were subject to paying a fair share fee but who joined MSEA, and are paying union dues and receiving the full benefits of union.⁶

ARGUMENT

Class action procedures “represent a careful balancing of the need for efficiency with the need to ensure adequate protection for the individual members of the class.” *Gottlieb v. Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993). Consequently, trial courts conduct a “rigorous analysis of the prerequisites established by Rule 23 before certifying a class.” *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003).

The four prerequisites of class certification under Rule 23(a) are:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The burden is on the party moving for class certification to establish all four required elements under Rule 23(a). *See Smilow*, 323 F.3d at 38; *Makuc*

⁶ Although *not* encompassed in Plaintiffs’ restated class definition, which unlike the earlier proposed class definition, does not include “future” nonmembers, in their renewed motion Plaintiffs suggest that “future nonmembers in these bargaining units may also be subject to these demands for payment of agency fees, and therefore, are potential class members.” Pls. Renewed Mot. at 5. Given that Plaintiffs’ current proposed class definition does not include “future” nonmembers, we do not address the propriety of such a class definition.

v. American Honda Motor Co., Inc., 835 F.2d 389, 394 (1st Cir. 1987) (“The plaintiff has the burden of showing that all the prerequisites for a class action have been met.”); *Vigue v. Ives*, 138 F.R.D. 6 (D. Me. 1991).⁷

If putative class representatives seek to include in their class individuals whose interests are significantly different from their own, there may be insufficient commonality or typicality to certify a class under Rule 23(a). *See, e.g., General Tel. Co. v. Falcon*, 457 U.S. 147 (1982). Similarly, putative class representatives cannot adequately represent a proposed class if their interests conflict with the interests of any of the class members. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985).

For purposes of the pending motion, MSEA is prepared to assume that the named Plaintiffs are capable of adequately representing current *nonmember* employees who are subject to the service fee requirement, and that the named Plaintiffs share a common interest with the other *nonmembers* in the relief they seek.⁸ However, the class that Plaintiffs seek to represent also encompasses all current dues-paying members who at one

⁷ Plaintiffs maintain that Defendants bear the burden of establishing inadequacy of representation, relying on authorities from other circuits. *See* Pls. Renewed Mot. at 13. However, even assuming *arguendo* that these authorities—which primarily involve shareholder derivative litigation under Rule 23.1—would otherwise be relevant to the case at bar, Plaintiffs completely disregard the law of *this circuit*, which, as demonstrated by the authorities cited in text, is squarely to the contrary, and clearly establishes that *Plaintiffs* bear the burden of establishing all four requirements under Rule 23(a), including adequacy of representation.

⁸ Although we do not contend that the named Plaintiffs are inadequate representatives of the class of current fee payers, we do note that only one of the 20 named Plaintiffs has paid any fair share fee to the union; the remaining 19 proposed class representatives are delinquent in their fair share obligations. Labbe Decl. at ¶ 8. Given that all fees collected by the union are being placed in an interest-bearing escrow account, *id.* at ¶ 7, their failure to remit their fair share fees is improper. *See Bhd. of Ry. Employees v. Allen*, 373 U.S. 113, 120 (1963) (plaintiff nonmembers must comply with their financial obligations to the union pending the court’s resolution of their agency fee claim; claims by plaintiffs who fail to do so must be dismissed).

time were considered under applicable collective bargaining agreements to be subject to payment of fair share fees. As to those individuals, a clear conflict of interest exists that precludes their inclusion in the class.

1. Plaintiffs suggest that there can be no conflict of interest among the class members when “all had a right to adequate notice and procedures that comply with *Hudson*, without regard to what they subsequently might have done with them.” Pls. Renewed Mot. at 10 (citing *Weaver v. Univ. of Cincinnati*, 942 F.2d 1039, 1047 (6th Cir. 1991)); Pls. Renewed Mot. at 12 (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 485-87 (5th Cir. 1982), and *Waters v. Barry*, 711 F. Supp. 1125, 1130-32 (D.D.C. 1989)). However, even if all members of the putative class had a right based on the First Amendment to receive the same fair share notice from MSEA—and here they did not, *see supra* at 2—this does not preclude the existence of class conflicts. It is well established that conflicts of interest may exist among members of a proposed class, and may preclude certification, even when all putative class members are commonly affected by a challenged policy or decision. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (“Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.”).⁹

⁹ The decisions cited by Plaintiffs are not to the contrary. Indeed, the court in the *Weaver* litigation ultimately *denied* certification of a *Hudson* class due to intra-class conflicts. *See Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1530 (6th Cir. 1992). *Horton* acknowledged that potential conflicts in the motivations of class members could preclude certification of a *Hudson* class, but found the class representatives adequate under the facts of that particular case, *see* 690 F.2d at 485-87; and *Waters* (which did not

2. With respect to the issues raised by Plaintiffs' Amended Complaint, the dues-paying members stand on very different footing from the Plaintiffs and other nonmembers, and the interests of the two groups clearly conflict.

Plaintiffs assert that some of the dues-paying class members might not have chosen to become union members had the notices satisfied the requirements of *Hudson* as Plaintiffs conceive of those requirements. This of course is not true of the 624 members who joined the union *prior* to receiving any of the 2005 period fair share notices. Labbe Decl. at ¶ 4. Indeed, these union members would have no standing to join the lawsuit as plaintiffs for the simple reason that they were already full union members when the 2005 fair share period notices were distributed to nonmembers. The First Amendment rights protected by *Hudson* are the rights of those employees who choose to be nonmembers; unions do not have a corresponding First Amendment obligation to provide union members the right to object to paying full union dues. *Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283, 297-302 (4th Cir. 1991). Because the bargaining unit employees who joined as union members prior to distribution of any of the 2005 fair share fee notices could not be part of this class under any circumstances, we limit our discussion of the intra-class conflict to those putative class members who joined the union as members *after* the union distributed the April 2005 fair share notice ("post-notice members").

To the extent Plaintiffs would suggest that of the post-notice members, some might not have chosen to become and remain union members had the 2005 notices contained the *Hudson* protections as Plaintiffs conceive of them, there is no basis in fact

involve a *Hudson* class) found the potential conflict asserted to be too speculative to preclude class certification on the facts of that case. *See* 711 F. Supp. at 1132.

for any such assertion.¹⁰ Rather, such a conclusion is entirely implausible given that: (i) all of these individuals were informed in each of the notices that, if they chose to become members, they would pay a higher amount in dues than they would pay in service fees should they choose to remain nonmembers, and they all chose to become members notwithstanding that fact; (ii) every post-notice member has been given, in conjunction with the July notice, the opportunity to return to nonmember status if he or she desired to do so; (iii) of the 624 fair share fee payers who joined the union as dues-paying members after April 2005, Labbe Decl. at ¶ 4, only 56 chose to resign their membership and return to fee paying status after receiving the July Notice and the memo informing them of their right to resign from the union and pay the reduced fair share fee, *id.* at ¶ 5;¹¹ and (iv) doesn't say this (*not one* of the post-notice members has seen fit to become a plaintiff in this case.) *See id.*

It therefore would defy reality to assume that all of the employees who have become members of MSEA since the April notice was issued, *and* who have chosen to remain members even after being provided a clear notice of the option to resign in conjunction with the July notice, remain dues-paying union members involuntarily or

¹⁰ In connection with Plaintiffs' Reply brief in connection with their original class certification motion, Plaintiffs submitted the declarations of two employees, Roger Drolet and Ruby Skillings. Docket No. 38. As noted in Mr. Drolet's declaration, once he understood his right to become a fee payer, he revoked his membership authorization. Drolet Decl. at ¶ 5. Thus Mr. Drolet *is* a member of the class by virtue of his decision to become a fee payer. As to Ms. Skillings, although she claims that she would not have joined the union or authorized fee deductions from her wages had she known about the pending lawsuit, Skillings Decl. at ¶ 8, she inexplicably has chosen to remain a union member. In any event, according to Ms. Skillings's declaration, nothing about the allegedly inadequate fair share notices that are the subject of this litigation was the basis for her joining the union. *See id.* at ¶¶ 5-7.

¹¹ Of course, those 56 nonmember employees who did resign their membership from the union *would* be part of the putative class.

because of some deficiency in the notice. Indeed, at this point, it is implausible even to assume that any significant number of the post-notice members might fall into such a category. Rather, it cannot be disputed that employees who choose to become members of a union commonly do so because they wish to support the organization and to have the right to participate in the organization's policymaking and governance. In addition, as noted in MSEA's submission in connection with Plaintiffs' original Motion for Class Certification, employees who become members of MSEA become eligible for a variety of benefits, including certain insurance programs, that are provided exclusively to dues-paying members. *See* Declaration of Timothy Belcher (Docket No. 24) at ¶ 22. Plaintiffs' proposed class would include many individuals who chose to become members of MSEA and to remain members for such reasons.

Each of those post-notice members has interests that directly conflict with those of the Plaintiffs. As Chief Judge Posner explained in *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989), litigation that seeks to reduce the funds available to a union—as Plaintiffs seek here—is contrary to the interests of employees who do not want to see the union weakened. *See also Weaver*, 970 F.2d at 1530-31; *Kidwell*, 946 F.2d at 304-05. Judge Posner noted that even *nonmembers* who are “happy to be represented by a union,” *Gilpin*, 875 F.2d at 1313, have interests that may conflict with the objectives of plaintiffs who seek to reduce the fees that nonmembers must pay to a union; and such litigation plainly is not in the interests of union *members* who have voluntarily chosen to join the organization and to support it with full dues.

Plaintiffs' claims present a conflict of interest for another reason as well: if Plaintiffs were to prevail on their claims, the employees who became members and who

have chosen to remain members would lose the benefits of MSEA membership, including the right to participate in union governance and access to members-only benefits such as insurance programs, because those benefits are available only to members who pay full dues.

3. Consistent with the discussion above, the only two cases squarely addressing this question have held that class actions challenging agency fees cannot properly include union members. In *Mitchell v. Los Angeles Unified School District*, 744 F. Supp. 938, 939-40 & n.3 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992), the court held that the union had “failed to comply with the disclosure requirements regarding its allocation between chargeable and non-chargeable expenditures,” but nonetheless determined that members who joined the union in response to the notice solicitation could not be included in the class. 744 F. Supp. at 939. Although the Plaintiffs argued in *Mitchell*, as here, “that an employee who became a union member may have been misled” by the allegedly inadequate *Hudson* notice, *id.* at 940 n.3, the court found this possibility “too attenuated to justify inclusion of such [an] employee in the class.” *Id.*¹² Similarly, in *Murray v. Local 2620, AFSCME*, 192 F.R.D. 629 (N.D. Cal. 2000), the court excluded from a proposed class nonmembers who had joined the union after issuance of an allegedly inadequate *Hudson* notice. The court found that those members’ “interest[s] now coincide[d] with that of the union and not of

¹² Plaintiffs cite *Mitchell* in their renewed motion, suggesting that the present case is “indistinguishable” from, *inter alia*, the *Mitchell* case. Pls. Renewed Mot. at 4-5. To the extent that *Mitchell* held that the certified class could not include those employees who joined as union members, we agree.

the agency fee payers” and that they were, accordingly, not “similarly situated” to those employees who had refused to join the union.¹³ *Id.* at 632 & n.6.

For these reasons, Plaintiffs’ attempt to include in the class individuals who have joined MSEA as members creates an intractable conflict. The post-notice members are now union members and share a common interest with their fellow union members, not with nonmember employees who refuse to join or to contribute to the costs of the union’s activities. These union members now have an interest in preserving their eligibility for the benefits that come with membership, in maintaining the financial vitality of the union, and in reducing the extent to which their own dues will be required to subsidize nonmembers who wish to receive collective bargaining services from the union without paying for them.

Thus, the interests of the members (including the post-notice members) directly conflict with the position advanced by the Plaintiffs, which seeks to minimize or eliminate service fee obligations, and this precludes the Plaintiffs from representing union members in this action.

¹³ Plaintiffs suggest that “[s]imilar classes have been certified in not fewer than ten (10) officially reported cases.” Pls. Renewed Mot. at 2-3. However, only a few of the cases that Plaintiffs reference discuss class definitions even arguably akin to the class proposed here. *See Swanson v. Univ. of Haw. Prof’l Assembly*, 212 F.R.D. 574, 576 (D. Haw. 2003); *Cummings v. Connell*, 163 L.R.R.M. 2086, 2089 (E.D. Cal. 1999); *Hunter v. City of Phila.*, 161 L.R.R.M. 2664, 2667 (E.D. Pa. 1999); *Reese v. City of Columbus*, 798 F. Supp. 463, 472 (S.D. Ohio 1992). And *none* of these cases discussed the issue of whether members should be included in the class, much less concluded that such inclusion was appropriate.

CONCLUSION

For the foregoing reasons, while MSEA would not oppose certification of a class limited to nonmembers, this Court should deny Plaintiffs' request to certify a class encompassing any current union members.

Respectfully submitted,

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December 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2005, I electronically filed Defendant Maine State Employees Association's Memorandum in Response to Plaintiffs' Renewed Motion for Class Certification and Appointment of Class Counsel with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Stephen C. Whiting, W. James Young, Philip J. Moss, William H. Laubenstein, III, and Jeffrey Neil Young.

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