

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

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

**DEFENDANT MAINE STATE EMPLOYEES ASSOCIATION’S MOTION FOR  
SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW  
(CORRECTED COPY)**

Pursuant to Fed. R. Civ. P. 56(b) and Maine Local Rule 56, Defendant Maine State Employees Association (“MSEA” or the “Union”) respectfully submits this Motion for Summary Judgment with Incorporated Memorandum of Law.

**INTRODUCTION**

Plaintiffs, employees of certain Executive Branch bargaining units within the State of Maine, have brought this action against various State officials and the Union. Plaintiffs are represented by the Union for collective bargaining and contract administration, but have chosen not to become Union members. *See* Defendant MSEA’s Statement of Material Facts as to Which There Is No Genuine Issue (“Material Facts”), attached, at ¶ 2. Pursuant to collective bargaining agreements negotiated in 2005 (“2005 contracts”), the Union seeks to collect from nonmembers service fees to compensate for the costs that MSEA incurs in providing collective bargaining and contract administration services on behalf of all bargaining unit members. *See id.* at ¶¶ 7-8.

Plaintiffs seek to proceed as representatives of a class of all employees who have been nonmembers of the Union for any period since April 2005 (hereinafter “nonmember employees”). Plaintiffs’ Amended Complaint, brought pursuant to 42 U.S.C. § 1983, alleges that: (1) the Union provided inadequate notice explaining the calculation of the service fees; (2) the Union provided an insufficient advance reduction of the fees collected because the fees are based on expenses that must be considered nonchargeable to nonmembers; and (3) the indemnification clause included with the service fee provisions of the 2005 contracts is void as against public policy. *See* Pls.’ First Am. and/or Supplemental Class Action Compl. (“Am. Compl.”) (d/e 47) at ¶¶ 1, 29-47. Plaintiffs contend that Defendants thereby violated nonmember employees’ First, Fifth and Fourteenth Amendment rights. *See id.* at ¶¶ 31, 33, 38-40, 42-47.

Subsequent to the filing of the Complaint, MSEA made certain changes in its service fee calculations and procedures, which have mooted most of Plaintiffs’ claims. Plaintiffs filed a Motion for Preliminary Injunction, which the Court denied because Plaintiffs did not demonstrate likelihood of success on the merits or a probability of irreparable injury. *See* Order on Mot. for Prelim. Inj. (“Injunction Order”) (d/e 39) at 4.<sup>1</sup>

As we will show, Plaintiffs’ claims concerning the adequacy of the notice and advance reduction fail for the reasons stated by the Court in its Injunction Order. As for Plaintiffs’ remaining claim, concerning the indemnification clause, Plaintiffs lack standing to assert that claim, and the claim lacks merit as a matter of law in any event. The Union, therefore, is entitled to summary judgment on all issues.

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<sup>1</sup> Although preliminary injunction orders generally are not considered law of the case because of their preliminary nature, *see A.M. Capen’s Co., Inc. v. Am. Trading & Prod. Corp.*, 202 F.3d 469, 472-73 (1st Cir. 2000), this Court may treat as law of the case legal issues actually considered and decided, where no intervening evidence has undermined the legal conclusion, *see Cohen v. Brown Univ.*, 101 F.3d 155, 167-69 (1st Cir. 1996); *Mank v. Green*, 323 F. Supp. 2d 115, 122 n.10 (D. Me. 2004). Here no intervening evidence casts any doubt on the well-reasoned analysis in this Court’s Injunction Order.

## ARGUMENT

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no genuine issue as to any fact material to the resolution of this dispute; the case presents pure questions of law and is properly decided on summary judgment.

### **A. The Union is Entitled to Summary Judgment on Plaintiffs’ Claims Concerning the Adequacy of the Notice of the Service Fees**

The constitutional requirements for collection of service fees, including the sending of a “*Hudson* notice,” are summarized in this Court’s Injunction Order. As this Court stated at pages 5-6 of that order:

It is constitutionally permissible for unions to enter into collective bargaining agreements with public employers that require nonmembers to contribute dues to the union in order to avoid “free riders.” *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223–224 (1977). “Employees can be made to pay both the direct costs associated with negotiating and administering collective-bargaining agreements and their share of the indirect expenses a union reasonably incurs in performing its duties as their exclusive representative.” *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 297 (1st Cir. 2000). However, the First Amendment prohibits such fees from being used for “ideological activities not ‘germane’ to the purpose for which compelled association [is] justified: collective bargaining.” *Id.*

In *Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court found that the First Amendment demands that public-employee unions follow certain procedures to protect the speech and associational rights of nonmembers. These constitutional requirements include providing (1) “an adequate explanation of the basis for the fee,” (2) “a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker,” and (3) “an escrow for the amounts reasonably in dispute while such challenges are pending.” *Id.* at 310.

Here, MSEA originally issued a *Hudson* notice in April 2005 (“April Notice”), well in advance of collection of any service fees pursuant to the 2005 contracts. *See* Material Facts at ¶¶ 13, 22. Thereafter, but still prior to the collection of any fees, the Union issued two subsequent

notices—the “June Notice” and the “July Notice”—based on newer financial information and the Union’s decision to treat organizing expenses as nonchargeable to nonmembers. *See id.* at ¶¶ 14-16.

1. Plaintiffs contend that the April Notice was constitutionally flawed in various respects. *See Am. Compl.* at ¶¶ 29-30, 32; *Pls.’ Mem. in Supp. of Mot. for Prelim. Inj.* (“Pls.’ P.I. Mem.”) (d/e 6) at 4-9.<sup>2</sup> However, most of those contentions were mooted by the July Notice, as this Court has held, which was issued well before service fee collections began and which superseded the earlier Notices. *See Injunction Order* at 7; *Material Facts* at ¶ 15.

As to both MSEA’s expenditures and those of MSEA’s parent union, the Service Employees International Union (“SEIU” or the “International Union”), the July Notice uses data from the most recent year for which audited data is available, 2004 in the case of MSEA and 2003 in the case of SEIU. *See Material Facts* at ¶ 17. Thus, Plaintiffs’ claim that the April Notice used “stale” 2002 data for SEIU is moot. And, as the Court concluded in its *Injunction Order*, it is permissible to use different base years for affiliated entities where the most recent available data is used for each. *See Injunction Order* at 12 (stating “the Court finds that use of financial data from different years for the MSEA and the SEIU respectively in the July Notice is permissible under *Hudson*”). This is consistent with *Hudson*’s recognition that “absolute precision in the calculation of the charge to nonmembers cannot be expected or required.” 475 U.S. at 307 n.18 (internal quotation marks omitted).

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<sup>2</sup> Neither Plaintiffs’ Complaint nor their answers to MSEA’s interrogatories, *see Declaration of Robert Alexander* (“Alexander Decl.”) Ex. 2 (Plaintiffs’ Objections & Answers to MSEA’s Interrogatories) (hereinafter “Pls.’ Interrog. Answers”), provides any specifics as to how the service fee program allegedly violated Plaintiffs’ rights. However, Plaintiffs’ interrogatory answers frequently refer to Plaintiffs’ memorandum in support of their motion for a preliminary injunction, so we cite to that memorandum as providing an explication of Plaintiffs’ claims.

As the Court concluded in its Injunction Order, Plaintiffs' contention that the Notice is deficient because SEIU's disclosure does not break payments to affiliates into chargeable and nonchargeable expenses, *see* Pls.' Interrog. Answers at No. 4 (citing Pls.' P.I. Mem.), likewise was mooted by the July Notice. *See* Injunction Order at 10. In that notice, MSEA included the entire SEIU auditor's statement of the allocation of expenses, including the auditor's notes that explain that payments to SEIU's local affiliates were treated as chargeable if made as reimbursements for operating expenses, and nonchargeable if made as subsidies for organizing. *See* Material Facts at ¶ 18. A *Hudson* notice is adequate if it provides sufficient information "to enable the employee to decide whether to object," *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991), and the auditor's notes regarding the treatment of SEIU's payments to affiliates easily satisfy that standard.

2. The only adequacy-of-notice claim advanced by the Plaintiffs that was not clearly mooted by the issuance of the July Notice is Plaintiffs' contention that the "demand for payment of agency fees . . . has occurred and threatens to continue to occur without the required audit of union expenditures." Am. Compl. at ¶ 32. In the Injunction Order (at 11-12), this Court declared itself to be "entirely satisfied" that MSEA had complied with *Hudson*'s requirements in this regard, and that conclusion remains correct on the undisputed facts.

The purpose of verification by an independent auditor is to give nonmembers assurance that the Union's records actually reflect the transactions that occurred. *See, e.g., Cummings v. Connell*, 316 F.3d 886, 892 (9th Cir. 2003). *Hudson* itself is clear on this point. "The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Hudson*, 475 U.S. at 307 n.18. "*Hudson* does not

mandate a union to utilize the *most* detailed and effective service available to audit the financial information disclosed to nonmember employees.” *Gwirtz v. Ohio Educ. Ass’n*, 887 F.2d 678, 682 (6th Cir. 1989) (rejecting claim that a lower level of auditing services was insufficient) (emphasis in original); *see also Andrews v. Educ. Ass’n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (concluding that an agency fee notice in which the audit report did not separate the union’s expenses into chargeable and nonchargeable categories was permissible under *Hudson*).

Here, MSEA sent the Independent Auditor’s Report of its 2004 financial statements with the operative July Notice. *See* Material Facts at ¶ 17. In connection with this audit, the auditor verified the Union’s major categories of expenses for 2004, the year as to which MSEA made an allocation of chargeable and nonchargeable expenses. Plaintiffs do not dispute the sufficiency of the audit.<sup>3</sup> Plaintiffs’ argument is based solely on the fact that the chargeable percentage, which was derived from the audited data, was revised in the July Notice. But that revision was not based on any additional or different expenses for the 2004 audit year; it simply reflected the Union’s decision to treat one category of the 2004 expenses that *already had been audited*—expenses related to organizing—as nonchargeable rather than chargeable.

The July Notice explained the Union’s decision to reclassify organizing expenses, how the final calculation of the service fee was performed, and that the treatment of organizing expenses as nonchargeable in the recalculation of the service fee was the reason that the recalculated service fee was lower than the chargeable expenses as calculated in the Independent Auditor’s Report included with the Notice. *See* Material Facts at ¶¶ 16-17, 20 & Declaration of Timothy Belcher (“Belcher Decl.”) Ex. 5. In an abundance of caution, the Union verified its recalculation with the auditor, and included in the July Notice a letter from a partner at the

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<sup>3</sup> Plaintiffs’ expert witness, Mark Myers, specifically declined to provide an opinion that the Independent Auditor’s Report sent with the July Notice was inadequate. *See* Material Facts at ¶ 19.

auditing firm affirming that the calculation was based on expenditures consistent with the prior audited statement. *See* Material Facts at ¶¶ 17, 20 & Belcher Decl. Ex. 5 at 11.

There is no basis in law for requiring the Union to undergo a new independent audit and obtain a new audit report merely because one category of expenses was reclassified and simple arithmetic was performed to revise the chargeability percentage accordingly. In its Injunction Order, this Court cogently explained why Plaintiffs' demand for additional auditing is meritless:

Plaintiffs' argument that the financial disclosures in the July Notice were "reviewed" rather than "audited" by an independent auditor is without merit. Plaintiffs cite a Ninth Circuit case for the proposition that *Hudson's* prescription of "verification by an independent auditor," 475 U.S. at 307 n.18, requires a specific type of audit that provides "at least some verification of the amounts disclosed in the financial statement." *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106–1107 (9th Cir. 1999). However, even if this Court were to accept the distinction urged upon it by Plaintiffs, the letter from the auditor included in the July Notice (July Notice at 11) establishes to the Court's satisfaction that a full audit of the union's 2004 fiscal year as defined in *Prescott* was undertaken.

While the auditor did not conduct an entirely new audit after the MSEA's decision to recategorize organizing expenses from chargeable to non-chargeable, it is implausible that *Hudson* requires such an undertaking. The recategorization of an expense from the chargeable to the non-chargeable category is the decision of the union, not the auditor. It is not clear to the Court that *Hudson* requires *any* review of such policy changes by an auditor. However, if review is required, the review provided by the MSEA's auditor was certainly sufficient. It is clear from the record that the auditor examined the union's recalculation of the service fees under the new formula and confirmed that it properly utilized the 2004 financial data, which had previously been fully verified by the auditor, in making its calculation. *The Court is entirely satisfied that this undertaking by the auditor fully satisfies the requirements of Hudson, if indeed it does not surpass them.*

Injunction Order at 11-12 (emphasis in final sentence added).

**B. The Union is Entitled to Summary Judgment on Plaintiffs' Claim that the Union Did Not Provide an Adequate Advance Reduction of the Service Fee**

Plaintiffs allege that the amounts collected pursuant to the July Notice failed to provide an adequate "advance reduction" of the service fee, because, in calculating the amount of the fee, MSEA treated as chargeable certain expenses that Plaintiffs maintain are not constitutionally

chargeable to nonmembers. *See* Pls.’ Interrog. Answers, Nos. 3-4. Plaintiffs’ claim fails for two independent reasons.

1. First, Plaintiffs’ contention that MSEA did not provide an adequate “advance reduction” does not make out a constitutional injury. In the Injunction Order, this Court considered and rejected Plaintiffs’ contention that, in addition to the three constitutional requirements that are set out in *Hudson*, *see supra* at 3, *Hudson* should be read as mandating a *fourth* requirement in the form of an “advance reduction.”<sup>4</sup> This Court stated:

The Court does not agree with this interpretation of *Hudson*. It appears to the Court that *Hudson* is focused solely the adequacy of the notice to the nonmember—in other words, whether the notice gives the nonmember enough information to decide whether to object. There is no implicit “fourth prong” of *Hudson* imposing an additional substantive requirement that the notice get the categorization of expenses correct. Assuming the union’s notice is adequate enough to protect nonmembers’ ability to determine whether to object, *Hudson* holds that an impartial arbitrator and the escrowing of objectors’ fees pending resolution of the complaint is sufficient to safeguard the nonmembers’ constitutional rights. The Court notes that several Circuits, including the Second, Third, Fourth, Ninth, and Eleventh have held that an escrow of service fees that complies with *Hudson*’s requirements adequately protects nonmembers’ First Amendment rights. *See Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1374 (9th Cir. 1993), *Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990), *cert. dismissed*, 112 S. Ct. 633 (1991); *Crawford v. Air Line Pilots Ass’n Int’l*, 870 F.2d 155, 161 (4th Cir. 1989); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989); *Andrews v. Education Ass’n*, 829 F.2d 335, 339 (2d Cir. 1987). Indeed, these holdings seem to best comport with the Supreme Court’s suggestion in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks* that “advance reduction of dues and/or interest-bearing escrow

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<sup>4</sup> Plaintiffs base their position on a statement in *Hudson* in which the Supreme Court noted the fee collection system in that case was deficient because it did not provide “an adequate explanation for the advance reduction of dues.” 475 U.S. at 309. Plaintiffs mistake the import of that statement. *Hudson* happened to be a case in which the union provided an advance reduction, and the union’s explanation for its calculation of the agency fee was made in the framework of explaining how the advance reduction had been determined. Thus, when the Court stated that it was necessary for the union to present “an adequate explanation for the advance reduction,” what the Court was requiring was *an adequate explanation of the basis for the union’s computation of the agency fee*, not an advance reduction as such. This is confirmed by the concluding paragraph of the opinion, in which the Court, summarizing “the constitutional requirements for the Union’s collection of agency fees,” *id.* at 310, made no mention at all of the need for an advance reduction, but instead referred to the need for “an adequate explanation of *the basis for the fee.*” *Id.* (emphasis added).

accounts” would protect nonmembers from any First Amendment violations. 466 U.S. 435, 444 (1984) (emphasis added).

Injunction Order at 14-15 (internal footnote omitted).

Only one circuit, the Sixth, has held an advance reduction to be necessary, employing reasoning that has been sharply criticized by other courts. *See, e.g., Grunwald*, 994 F.2d at 1374-75 & n.4 (Kozinski, J.). And as this Court observed, although the “First Circuit has not directly considered the issue, . . . it has decided a case involving the use of bar dues for ideological purposes that strongly suggests it would consider an ‘objection-and-escrow’ procedure to be appropriate.” Injunction Order at 14-15 n.6 (citing *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990)).<sup>5</sup>

2. Even if an advance reduction *were* constitutionally required, MSEA is entitled to summary judgment because the advance reduction the Union has provided clearly excludes “that portion of the[ ] fees which an independent audit *unquestionably indicates would be spent for ideological purposes.*” *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987) (emphasis added) (applying Sixth Circuit minority view requiring advance reductions).

Plaintiffs claim that the advance reduction is insufficient because the Union is treating as chargeable certain activities—specifically organizing expenses, expenses for publicity related to organizing activities, and expenses for litigation on behalf of employees outside of the Maine bargaining units—that Plaintiffs allege are nonchargeable. *See* Am. Compl. at ¶ 36; Pls.’ P.I.

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<sup>5</sup> In *Schneider*, members of Puerto Rico’s integrated bar association challenged a commonwealth statute requiring them to join and contribute fees to the bar association, which used the fees to support ideological causes. The court affirmed the district court’s holding that the association’s procedure—whereby it collected the entire amount of dues from objectors and placed only 15% of those dues in escrow pending the resolution of objectors’ challenges—did not adequately protect the objectors’ First Amendment rights. *Id.* at 634. The court held that the bar association was obligated to escrow an amount based on its actual anticipated expenditures for nonchargeable activities. *Id.* Nevertheless, the court—interpreting *Hudson*—determined that the procedure required by the district court in *Schneider*, whereby

Mem. at 9-10.<sup>6</sup> However, pursuant to the July Notice, the service fee excludes organizing expenses and publicity relating thereto,<sup>7</sup> *see* Material Facts at ¶¶ 16-17 & Belcher Decl. Ex. 5, so the only category that remains at issue is so-called “extra-unit litigation” expenses.

The courts that have considered whether extra-unit litigation expenditures are chargeable to dissenting nonmembers in the public sector have squarely held that they are. *See Otto v. Pa. State Educ. Ass’n.*, 330 F.3d 125, 138 (3d Cir. 2003) (holding that litigation expenses pooled with affiliates are chargeable to nonmembers); *Reese v. City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995) (affirming the dissolution of an injunction because plaintiffs were not likely to succeed on the claim that extra-unit litigation expenses should be treated as nonchargeable); *see also Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998) (holding that the NLRB’s decision to permit nonmembers to be charged for extra-unit litigation expenditures was reasonable under the National Labor Relations Act).<sup>8</sup>

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the bar association would collect *full dues* and escrow a portion representing a conservative assessment of the portion of such dues that went to ideological activities, was constitutional. *Id.*

<sup>6</sup> Plaintiffs’ challenges to the fee calculation are limited to the challenges they have specified, because “[a]gency-fee challengers, like all other civil litigants, must make their objections known with the degree of specificity appropriate at each stage of litigation their case reaches.” *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 878 (1998).

<sup>7</sup> It should be emphasized that, contrary to Plaintiffs’ contention, it is far from settled that organizing expenses cannot be charged to dissenting nonmember employees. Plaintiffs cite the Supreme Court’s decisions in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 555 (1991), and *Ellis v. Railway Clerks*, 466 U.S. 435, 451-53 (1984), in support of their contention that organizing expenditures are nonchargeable. *See* Pls.’ P.I. Mem. at 12. However, *Ellis* was decided on the statutory, not constitutional, ground that expenditures for organizing were outside the scope of the Railway Labor Act’s service fee authorization. 466 U.S. at 451-53. With respect to *Lehnert*, Plaintiffs cite to Justice Scalia’s concurring opinion, which did not reflect the views of a majority of the Court, and which is not binding authority. Subsequent to *Ellis* and *Lehnert*, it was recognized in a related context that organizing expenditures properly are chargeable to nonmembers through a service fee. *See, e.g., United Food & Commercial Workers, Local 1036 v. NLRB*, 307 F.3d 760, 768-69 (9th Cir. 2002). Although MSEA firmly believes that organizing expenditures are germane to collective bargaining for the reasons set out by the Ninth Circuit, it has decided to treat such expenditures as nonchargeable.

<sup>8</sup> All of these decisions were issued subsequent to *Lehnert*, *supra* note 7. Although Plaintiffs have represented to this Court that the Supreme Court held in *Lehnert* that litigation is chargeable to a dissenting nonmember only if the litigation involves the nonmember’s own bargaining unit, *see* Pls.’ P.I. Mem. at 10-11, Plaintiffs fail to note that they quote Justice Blackmun’s plurality opinion in *Lehnert*,

Under *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 523 (1991), and other cases, unions are permitted to charge nonmembers a pro rata share of expenditures pooled for the benefit of many locals even if the expenditures were not incurred for the benefit of the particular bargaining unit in a particular year. *See also Otto*, 330 F.3d at 139-40; *Reese*, 71 F.3d at 623-24. Extra-unit litigation expenses are no different from and are chargeable to nonmembers in the same manner as other pooled expenses, because litigation expenses are “analytically identical” to other expenses. *Machinists*, 133 F.3d at 1016. It would be nonsensical, for example, to permit a union to charge nonmembers their pro rata share of the expenses of negotiating contracts, but not for the pro rata costs of suing to compel the employer to negotiate in good faith with respect to such contracts; or to count as chargeable the expense of prosecuting a grievance, but not the cost of suing to enforce the arbitrator’s award. Because there is “no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses,” *Otto*, 330 F.3d at 139, Plaintiffs’ contention that extra-unit litigation expenses must be treated as nonchargeable fails as a matter of law. *See also Reese*, 71 F.3d at 623-24.<sup>9</sup>

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which was *not* the opinion of the Court on this issue. *See Lehnert*, 500 U.S. at 528 (final paragraph of Part IV-B of Justice Blackmun’s opinion, quoted by Plaintiffs); *id.* at 507 (noting that the final paragraph of Part IV-B of Justice Blackmun’s opinion does *not* constitute the opinion of the Court).

<sup>9</sup> Even if Plaintiffs were correct in that contention—and even if this Court were to conclude, contrary to its ruling in the Injunction Order, that the Sixth Circuit’s minority position requiring advance reductions should be followed—it still would not be the case that the named Plaintiffs are being required to pay into escrow an amount “which an independent audit unquestionably indicates would be spent for ideological purposes.” *Tierney*, 824 F.2d at 1503. The named Plaintiffs are being required to pay into escrow only half of the service fee, an amount that is only 25% of Union dues. *See* Material Facts at ¶ 28. If extra-unit litigation costs were excluded in calculating the percentage of Union expenses that is constitutionally chargeable to objecting nonmembers, that percentage still would be substantially higher than 25%. *See* Belcher Decl. Ex. 5 at 8-10. For this reason as well, these Plaintiffs’ demand for a greater advance reduction is meritless as a matter of law.

**C. The Union is Entitled to Summary Judgment on Plaintiffs' Challenge to the Indemnification Clause in the 2003 and 2005 Contracts**

Both the 2003 and 2005 contracts contain an indemnification clause requiring the Union to indemnify the State for certain kinds of claims arising from the service fee program. *See* Material Facts at ¶¶ 10-11. The indemnification clause states:

MSEA-SEIU agrees that it shall indemnify, defend, reimburse, and hold the State harmless (collectively, "Indemnification") against any claim, demand, suit, cost, expense, damages, or any other form of liability, including attorneys' fees, costs, or other liability arising from or incurred as a result of any act taken or not taken by the State, its members, officers, agents, employees, or representatives in complying with or carrying out the provisions of this Article, including, but not limited to, as a result of being ordered to reinstate an employee terminated at the request of MSEA-SEIU for not paying the service fee; in reliance on any notice, letter, or authorization forwarded to the State by the union pursuant to this Article; and including but not limited to any charge that the State failed to discharge any duty owed to its employees arising out of the service fee deduction; *provided that*, nothing herein shall require Indemnification for any intentional deprivation of an individual's constitutional rights by the State. MSEA-SEIU will intervene in and defend any administrative or court litigation concerning the propriety of any act taken or not taken by the State, including, but not limited to, termination for failure to pay the service fee. In such litigation the State shall have no obligation to defend its act taken or not taken.

*See id.*; Affidavit of Kenneth Walo (d/e 66) at Ex. A.<sup>10</sup> Plaintiffs contend that the "indemnification sections of the CBAs are void as against public policy, invalid, and unenforceable, insofar as they cause the State and its officers to ignore consideration of whether the collection of agency fees violates the constitutional rights of nonunion State employees." Am. Compl. at ¶ 47.

**1. Plaintiffs Lack Standing to Challenge the Indemnification Clause**

Plaintiffs have no standing to challenge the indemnification clause. As with any claim before a court, to satisfy constitutional standing requirements, Plaintiffs must establish: (1) that

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<sup>10</sup> The Union and MSEA signed an agreement clarifying that the indemnification clause does not apply if an agent of the State intentionally deprives an individual of his or her constitutional rights. *See* Material

they suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A speculative, attenuated line of causation between a challenged action and an alleged injury is insufficient to confer standing. *See generally Allen v. Wright*, 468 U.S. 737, 759 (1984) (holding that parents of black public school children lacked standing to challenge the grant of tax exempt status to racially discriminatory private schools because “the links in the chain of causation between the challenged Government conduct and the asserted injury [to the plaintiffs’ children’s right to receive an education in an integrated school] are far too weak for the chain as a whole to sustain respondents’ standing”).

The party invoking a court’s jurisdiction “must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Adams v. Watson*, 10 F.3d 915, 919 (1st Cir. 1993). Furthermore, with respect to standing as with respect to other issues, “in response to a summary judgment motion . . . the plaintiffs can no longer rest on . . . ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts’” to establish standing. *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(c)).

In *Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003), the Ninth Circuit held that the plaintiffs lacked standing to challenge a service fee indemnification clause. Although the fee notice in *Prescott* was indeed inadequate and caused the plaintiffs injury, the court concluded that the “only cognizable injury the plaintiffs allege is

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Facts at ¶ 11; Walo Aff. at Ex. A. The quoted language includes the entire operative language of the indemnification clause.

that the union did not give them adequate notice of the basis of the fees” under *Hudson*. *Id.* at 845. Thus, the court held that the plaintiffs lacked standing because “the challenged indemnification clause . . . caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice.” *Id.* at 846. Rejecting the plaintiffs’ argument that the indemnification arrangement was a condition of the employer’s agreement to collect fees in the first place and thus caused the chain of action that resulted in the plaintiffs’ injury, the court concluded that that the “Plaintiffs’ injury was not caused by the employer’s entry into the collective bargaining agreement; it was caused by the union’s inadequate notice of expenditures on which agency fees were based.” *Id.* Furthermore, because the “remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson*, nor does it prevent future violations,” the court concluded that it was not likely that invalidation of the clause would redress the injury that the plaintiffs suffered. *Id.* See also *Cummings v. Connell*, 316 F.3d 886, 898 (9th Cir. 2003) (following *Prescott*).

*Prescott* is well-reasoned and should be followed in this case. Plaintiffs, who have the burden at the summary judgment stage of adducing “specific facts,” *Lujan*, 504 U.S. at 561, to establish standing, cannot point to any evidence to sustain their contention that the indemnification clause caused the allegedly unconstitutional conduct at issue.<sup>11</sup> When Plaintiffs

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<sup>11</sup> In *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), the Tenth Circuit stated that it “disagree[d] with the Ninth Circuit’s analysis” in *Prescott* because “the nonmembers’ entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the nonmembers’ paychecks.” *Id.* at 1199 n.3. However, the Tenth Circuit’s suggestion that the causal relationship necessary to establish standing may be “presume[d]” from an “argument” is contrary to the “specific facts” requirement set out in *Lujan*. Furthermore, Plaintiffs’ arguments for standing are even weaker here than in *Prescott* and *Wessel*, because the indemnification clause in those cases applied regardless of the nature of the employer’s conduct, whereas under the indemnification clause applicable in this case, the State remains financially responsible for “any intentional deprivation of an individual’s constitutional rights by the State.” See Material Facts at ¶ 11.

Of course, if the Court agrees with our argument that no unconstitutional conduct occurred here in the first place, then Plaintiffs cannot have suffered an “injury in fact” even if the State “ignore[d]

deposed the state official responsible for administering contracts with MSEA, Plaintiffs did not even ask any questions as to whether the indemnification clause affected the State's actions with respect to the Union's *Hudson* procedures implementing the service fee. *See* Alexander Decl. Ex. 4 (Deposition of Kenneth Walo). And Plaintiffs' assertion that the "clause has caused injury . . . insofar as it has resulted in the imposition of a forced-unionism obligation upon [the Plaintiffs]," Pls.' Interrog. Answers at No. 13, is the very kind of allegation that the *Prescott* Court properly held to be insufficient to establish standing. What Plaintiffs call a "forced-unionism obligation"—the service fee agreement—is perfectly legal, and any constitutional injury would be caused by a union's failure to carry out its *Hudson* obligations, not by the entry into the service fee agreement. *See Prescott*, 298 F.3d at 846.

In short, Plaintiffs' allegation that the indemnification clause has "cause[d] the State and its officers to ignore consideration of whether the collection of agency fees violates the constitutional rights of nonunion State employees," Am. Compl. at ¶ 47, remains a "mere allegation[ ]," *Lujan*, 504 U.S. at 561, for which Plaintiffs have no evidentiary support. Plaintiffs' claims concerning the indemnification clause should therefore be dismissed for lack of standing.

## **2. The Indemnification Clause Is Not Unlawful**

If the Court were to conclude that the Plaintiffs have standing to challenge the indemnification clause, the Court should grant summary judgment to the Union because the indemnification clause does not violate Plaintiffs' constitutional rights and Plaintiffs have failed to make out a § 1983 claim.

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consideration of whether the collection of agency fees violates the constitutional rights of nonunion State employees," Am. Compl. at ¶ 47, and the Plaintiffs' lack of standing to challenge the indemnification clause would be all the more patent. *See, e.g., Lujan*, 504 U.S. at 560; *Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972).

Plaintiffs assert that the indemnification clause is void as “against public policy.” *See* Am. Compl. at ¶ 47. However, Plaintiffs bring this action under 42 U.S.C. § 1983, *see id.* at ¶ 1, and § 1983 does not establish a cause of action for alleged violations of “public policy.” Rather, a § 1983 plaintiff must prove that he has been subjected to “the deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws.” *See* 42 U.S.C. § 1983. Thus, in order for Plaintiffs’ challenge to be cognizable under §1983, they must demonstrate that inclusion of the indemnification clause in the contracts deprives them of some constitutional right. As a matter of law, Plaintiffs cannot do so.

a. At the outset, it is important to note that under *Hudson*, any affirmative obligation on the part of a public employer in the context presented here is limited. Although *Hudson* implies that a government employer may have certain obligations to dissenting nonmembers, *see* 475 U.S. at 307-08 n.20, the *Hudson* Court made clear that the responsibility to carry out *Hudson*’s requirements with respect to the notice and the calculation of agency fees rests with the union not the employer. The *Hudson* Court refers to the “Union’s procedure” or the “Union’s collection of agency fees” throughout the opinion. *See Hudson*, 475 U.S. at 304-10; *see also id.* at 306 (recognizing that the union retains the burden of proof as to the chargeable amount because the “union[ ] possess[es] the facts and records from which the proportion of political to total union expenditures can reasonably be calculated”). The Court explained at length the steps that a *union* must take in administering an agency fee system, *see id.*, but did not identify a single step that a *public employer* must take in that regard. That omission could not have been inadvertent. In reciting the facts of the case before it, the *Hudson* Court noted that the public employer had “accepted the Union’s . . . determination [of the percentage of the fee that was chargeable to objectors] without questioning its method of calculation and without asking to

review any of the records supporting it.” *Id.* at 296. Yet, in its discussion and holding as to the changes that should be made in the agency fee procedures to satisfy constitutional requirements, the Court conspicuously did not suggest that the procedure should provide for review by the employer of the union’s records and fee calculations, nor did the Court hold that the public employer has any responsibility to monitor the union’s actions. And the Court expressly rejected the contention that the public employer should provide an administrative hearing to resolve objections to the amount of a fee, holding that it is sufficient for *the union* to provide for a hearing before an impartial arbitrator—a proceeding in which the public employer plays no part. *Id.* at 308 n.21.

From the analysis in *Hudson*, it is evident that a public employer has no duty to review a union’s *Hudson* notice before the notice is mailed to nonmembers. The Ninth Circuit has so held. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997); *Foster v. Mahdesian*, 268 F.3d 689, 694 (9th Cir. 2001). Similarly, the Wisconsin Supreme Court held in *Browne v. Wisconsin Employment Relations Commission*, 485 N.W.2d 376, 395 (Wis. 1992), that public employers are not required to oversee unions’ service fee procedures. The *Browne* court reasoned that the State Municipal Employment Relations Act “is designed to facilitate peaceful employment relations in the public sector, and we conclude that requiring oversight by the employers of the unions’ fair-share fee procedures may potentially undermine that design.” *Id.* (internal citation omitted).<sup>12</sup>

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<sup>12</sup> As *Browne* suggests, to impose a duty on public employers to oversee unions’ compliance with agency fee requirements would undermine one of the “important government interests,” *Abood*, 431 U.S. at 225, on which the collection of agency fees is predicated, namely the promotion of industrial peace and stable labor-management relations, *id.* at 219, 222-25. Those interests would be ill served by requiring an employer “to appoint itself the representative of some hypothetical non-union employees who may object to the amount of the agency fee set by the union.” *North Bay Dev. Disabilities Servs. v. NLRB*, 905 F.2d 476, 479 (D.C. Cir. 1990). *See also Serv. Employees Local 535 (North Bay Ctr.)*, 287 N.L.R.B. 1223,

b. Thus, while it may not be the case that “an employer has *no duty whatsoever* under *Hudson*,” *Wessel*, 299 F.3d at 1199 (emphasis added), any employer duty in this context is limited; in law and in fact, it is the *union* that determines the amount of the fee and the form of the notice. Given that reality, Plaintiffs’ challenge to the indemnification clause in this case fails as a matter both of § 1983 and First Amendment doctrine.

(i) Plaintiffs’ contention is erroneous as a matter of § 1983 law because, under § 1983, a governmental entity may be held liable only for constitutional injuries that are caused by its own policies. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (only “when execution of a government’s policy or custom . . . inflicts the injury [is] the government as an entity . . . responsible”); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 26 (1st Cir. 2005) (under § 1983, a public entity may be held liable only if the entity is responsible for the constitutional violation). Thus, for example, “[s]imply going along with discretionary decisions made by one’s subordinates” is insufficient to render a municipality liable. *St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988). The *Monell* line of cases reflects the Supreme Court’s understanding that the Congress that enacted § 1983 did not intend to make “state instrumentalities . . . liable for the constitutional violations . . . of others.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 728 (1989) (plurality opinion). But that is in effect what Plaintiffs seek to do in arguing that a public employer must be held financially responsible for a *union’s* alleged failure to comply with *Hudson*.

(ii) Even if Plaintiffs’ challenge to the indemnification clause were cognizable under § 1983, Plaintiffs have not made out a constitutional claim. Plaintiffs overlook the obvious fact

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1227 (1988) (noting that “industrial peace is not fostered by permitting employers to advance employee rights”), *petition for review denied sub nom. North Bay Dev. Disabilities Servs. v. NLRB*, *supra*.

that, to the extent that the indemnification agreement operates to decrease the State's financial liability, it operates to *increase* the *Union's* liability to precisely the same extent. If, as Plaintiffs hypothesize (albeit without any evidence), decreasing the State's potential liability will reduce the State's incentive to ensure compliance with *Hudson*, it follows logically that the Union's incentive to ensure compliance correspondingly will *increase*. There is no basis for concluding that the net effect will be to reduce compliance; as the Supreme Court has recognized in other contexts, deterrence of violations often is best achieved, not by making "most or all wrongdoers" responsible, but by placing full responsibility for the wrongdoing on a single actor. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981). There simply is no reason to assume that compliance with *Hudson* would be best achieved by diffusing potential financial liability between unions and employers. As the Third Circuit reasoned in refusing to strike down a service fee indemnification clause in *Hohe v. Casey*, 956 F.2d 399, 411-12 (3d Cir. 1992), it is the union "upon whom most obligations fall," and the union which "has a significant incentive to ensure that its procedures comply with the Constitution"; therefore "invalidation of the indemnification clause is not required by the First Amendment." *Id.* at 412.

We recognize that two courts of appeal have voided indemnification clauses in service fee agreements. *See Wessel*, 299 F.3d at 1197; *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992). We believe that the reasoning and result in both cases are flawed. In particular, both decisions simply assume, without discussion, that indemnification will tend to reduce compliance with constitutional requirements—an assumption that, as we have noted, has no basis where indemnification serves to *increase* the exposure of the party that has the principal compliance responsibilities. But be that as it may, *Wessel* and *Weaver* are distinguishable given the narrower scope of the indemnification language at issue in this case. In both *Wessel* and

*Weaver*, the indemnification clause was unlimited, applying even to intentional misconduct by the public employer, and both courts emphasized the breadth of the clauses. *See Wessel*, 299 F.3d at 1197; *Weaver*, 970 F.2d at 1536-38. Here, in contrast, the indemnification clause excludes from its scope “any intentional deprivation of an individual’s constitutional rights by the State.” *See Material Facts* at ¶ 11.<sup>13</sup>

Only through the purest speculation, unsupported even by common sense, much less by evidence, can Plaintiffs hypothesize that compliance with *Hudson*’s requirements will be diminished by an indemnification agreement through which the Union, rather than the employer, bears full financial responsibility for the legal consequences of any errors made by the Union in administering the service fee program, where there is no intentional wrongdoing by the employer. At the very least, the impact, if any, of the indemnification clause in this case on compliance with *Hudson* is hardly so clear as to make adoption of the clause a constitutional violation in and of itself. There is nothing amiss—and certainly nothing that violates the federal Constitution—in an agreement that *increases* the financial exposure of the alleged primary wrongdoer (the Union) by requiring that party to indemnify the employer who is dragged into litigation as a result of the Union’s alleged derelictions.

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<sup>13</sup> The First Circuit has not considered a challenge to an indemnification clause in a service fee agreement. However, referring to *Weaver* and *Hohe*, whose clauses indemnified for intentional wrongdoing, the Court noted that the enforceability of a clause indemnifying for “any liability the employer may incur due to the enforcement of the union’s security clause would present a sticky question.” *See EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 52 n.3 (1st Cir. 2002).

## CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for the Union on all claims.

Respectfully submitted,

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Dated: January 25, 2006

## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2006, I electronically filed the Corrected Copy of Defendant Maine State Employees Association's Motion for Summary Judgment with Incorporated Memorandum of Law 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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