

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DANIEL B. LOCKE, ET AL.)
)
 Plaintiffs,)
)
 v.)
)
 EDWARD A. KARASS, STATE)
 CONTROLLER, ET AL.,)
)
 Defendants.)

Civil Action No. 2:05-112-GZS

**OPPOSITION OF DEFENDANT
MAINE STATE EMPLOYEES ASSOCIATION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

On January 24, 2006, plaintiffs filed a motion for summary judgment and an accompanying 43-page brief in support thereof. *See* Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment ("Pls. Mem."). Defendant Maine State Employees Association ("MSEA" or the "Union") submits this opposition to plaintiffs' motion. Many of the issues presented by plaintiffs' motion have already been addressed in MSEA's own Motion for Summary Judgment with Incorporated Memorandum of Law [Dkt. No. 73] ("MSEA S.J. Mem."), and we will refer to that submission as appropriate in this opposition.

Introduction

Although plaintiffs have, without leave of Court, taken it upon themselves to brief their motion to the tune of 43 pages, they have not seen fit in all of those pages to mention *any* of the substantive rulings made by this Court in its order denying plaintiffs' motion for a preliminary injunction (the "Injunction Order" [Dkt. No. 39], reported at 382 F. Supp. 2d 181). In fact, plaintiffs' memorandum mentions that order exactly *once*, pronouncing (quite erroneously) that

“of course” this Court was wrong to determine that most of plaintiffs’ claims had been mooted by the issuance of the July 2005 *Hudson* Notice. *See* Pls. Mem. at 21 n.7. Plaintiffs do not even mention, much less attempt to refute, this Court’s careful analysis of the *merits* of the issues presented by the preliminary injunction motion – an analysis that serves to dispose of all of the “*Hudson* claims” raised in plaintiffs’ summary judgment motion and leaves open only the issues concerning the indemnification clause, which were not raised in the preliminary injunction motion.

We therefore need only briefly address plaintiffs’ *Hudson* claims in Part I below, before proceeding to show in Part II that plaintiffs’ challenge to the indemnification clause fails both for lack of standing and for lack of merit.

I. Plaintiffs Are Not Entitled to Summary Judgment on Their Claims Concerning MSEA’s *Hudson* Notices; On the Contrary, This Court Has Correctly Found Those Claims to Lack Merit As a Matter of Law

In their summary judgment memorandum, plaintiffs insist on devoting nine pages to an attack on MSEA’s *initial* (April 2005) *Hudson* Notice, *see* Pls. Mem. at 21-29, despite this Court’s determination that any challenge to that notice is moot; and plaintiffs then argue that the subsequent July Notice also was flawed, *see id.* at 29-33, despite this Court’s holdings to the contrary. Plaintiffs offer no new facts or arguments that should alter the conclusions previously reached by this Court, which are manifestly correct.

A. Plaintiffs’ Claims Concerning the Initial Notice are Moot

As this Court correctly reasoned, the operative notice in this case is “the July Notice, [which] supersedes the April Notice,” 382 F. Supp. 2d at 189, and therefore any claims concerning alleged deficiencies in the April Notice are moot to the extent that the alleged deficiencies were remedied in the July Notice. *Id.* at 187-89.

Plaintiffs blithely declare that “of course” this Court was incorrect in holding that “[m]ost of Plaintiffs’ Complaint is mooted by Defendants’ superseding July 12, 2005 notice.” Pls. Mem. at 21 n.7 (quoting 382 F. Supp. 2d at 186). Plaintiffs note that the Supreme Court did not find the *Hudson* litigation to be moot despite the fact that the union in *Hudson* had voluntarily changed its unconstitutional practices, and plaintiffs claim that the situation here is the same as in *Hudson*. See Pls. Mem. at 21 n.7. Plaintiffs neglect to mention, however, that this Court discussed this precise issue at length in the Injunction Order and concluded that “*Hudson* is distinguishable from the present case.” 382 F. Supp. 2d at 188. This Court was correct. In *Hudson*, the union changed its procedures *only after nonmembers had been required to make payments under constitutionally deficient procedures*, whereas in this case, no payments were required to be made until after the July Notice had been sent and nonmembers had been given an additional opportunity to object.¹ Furthermore, as this Court observed, in *Hudson* the union, after having collected fees improperly, chose to place the fees in escrow, but without making any commitment as to the terms or duration of the escrow, thus leaving open the possibility that funds would be used before constitutionally mandated procedures had been followed. See 382 F. Supp. 2d at 188-89. In this case, on the other hand, the allegedly deficient April Notice has been entirely superseded by the July Notice, and there is no possibility that MSEA will somehow revert to the April Notice. *Id.*²

¹ The April Notice did not state a deadline for objections, *see generally* Belcher Decl. [Dkt. No. 71], Ex. 3; the June Notice gave a deadline of August 1, 2005, *id.*, Ex. 4 at 4 [unpaginated]; and the July Notice extended the deadline to August 16, 2005, *id.*, Ex. 5 at 3. Under the collective bargaining agreement, collection of fees would not begin until after the first full pay period in July 2005, *id.*, Ex. 2 at 56, which meant that collection would not start until July 27, 2005. See 382 F. Supp. 2d at 190.

² Plaintiffs’ reliance on *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997), is also misplaced. In *Knight*, the unions not only had commenced collection of fees before sending proper *Hudson* notices, *see* 131 F.3d at 810, 815, but had set a deadline for

This Court was correct in concluding that any challenge to the superseded April Notice is moot. We therefore need not address plaintiffs' complaints about the April Notice.³

B. Plaintiffs' Claims Concerning the July Notice Are Without Merit As a Matter of Law

All of plaintiffs' complaints about the July Notice were presented to this Court on plaintiffs' motion for a preliminary injunction, and were correctly found by the Court to lack merit. Plaintiffs' memorandum says nothing that should cause this Court to reverse its previous determinations.

1. Nonmembers Were Given Adequate Time to Object

In the Injunction Order, this Court noted that “[p]laintiffs were given two weeks to review the July Notice and object before collection of fees would begin,” “[t]here is nothing to stop nonmembers concerned about their rights from objecting within this period,” and “[p]laintiffs do not explain why they believe that two weeks constitutes inadequate notice.” 382 F. Supp. 2d at 190.

All of that remains true. In their summary judgment memorandum, plaintiffs still do not explain why they believe that two weeks constitutes inadequate notice. Plaintiffs cite two decisions on this subject: in one of them, the court declared *five days* to be insufficient, *see Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986) (cited in Pls. Mem. at 30), and in the other, the court stated that two weeks notice would be *sufficient*, *see Lehnert v. Ferris Faculty Ass’n*, 643 F. Supp. 1306, 1332-33 (W.D. Mich. 1986) (cited in Pls. Mem. at 30), *aff’d*, 881 F.2d 1388 (6th Cir. 1989), *aff’d in part, rev’d in part*, 500 U.S. 507 (1991). In the circumstances of

responses to the inadequate initial notices which expired before the proper notices were sent, *see id.* at 812, 815.

³ To the limited extent that any of plaintiffs' criticisms of the April Notice are applicable to the July Notice as well, they are addressed in our discussion of the July Notice.

this case, where much of the information nonmembers might need had been provided *four months* before any payments were required, and the remaining information was provided two weeks beforehand, this Court plainly was correct in determining that nonmembers were given adequate time to object.

2. MSEA Complied With All Applicable Audit Requirements

Plaintiffs' contention that the disclosures in the July Notice had not been adequately audited, *see* Pls. Mem. at 31-32, is meritless for the reasons already stated by this Court, *see* 382 F. Supp. 2d at 189, and discussed in MSEA's own summary judgment motion, *see* MSEA S.J. Mem. at 4-7. Plaintiffs' memorandum says nothing new on this issue that warrants a response.

3. The July Notice Provides Adequate Disclosure Regarding Payments to Affiliates

Plaintiffs continue to argue that, even though the July Notice based the service fee on the most recent years for which audited expense figures were available, MSEA violated *Hudson's* requirements because MSEA's most recent audit was for 2004, while SEIU's was for 2003. *See* Pls. Mem. at 32. But this Court has correctly determined that "use of financial data from different years for the MSEA and the SEIU respectively in the July Notice is permissible under *Hudson*." *See* 382 F. Supp. 2d at 190; MSEA S.J. Mem. at 4. Furthermore, as this Court also has observed, if 2003 data had been used for both unions, the service fee chargeable to nonmembers would have been *higher*, not lower. *See* 382 F. Supp. 2d at 190 n.5. Thus, there is nothing to plaintiffs' complaint on this point.

Plaintiffs also assert that "*no* disclosure whatsoever is provided" as to certain payments to SEIU affiliates. Pls. Mem. at 32-33 (emphasis in original). Again, the Court has considered this issue, and has properly determined that "the breakdown of expenses . . . coupled with the auditor's notes explaining the allocation of funds within the category [at issue] . . . fully complies

with the requirements of *Hudson* and provides nonmembers with sufficient information to determine whether or not to object.” 382 F. Supp. 2d at 189 n.4. Plaintiffs’ summary judgment memorandum again ignores the Court’s ruling, and presents nothing that would warrant a different result. *See generally* Belcher Decl. [Dkt. No. 71], Ex. 5 at 23, 27-29 (SEIU auditor’s notes explaining how payments to affiliates were treated).

4. The July Notice Does Not Run Afoul of Any “Advance Reduction” Requirement

Plaintiffs’ final contention with respect to the July Notice is that MSEA provided an insufficient “advance reduction” of the amount of the fee because, in calculating the amount to be collected and placed in escrow, the Union treated as chargeable certain expenses that plaintiffs maintain are nonchargeable. *See* Pls. Mem. at 32.

Plaintiffs’ claim fails at the threshold, because, as this Court has cogently explained, *Hudson* does not require any “advance reduction” where, as here, the funds collected are placed in escrow pending resolution of any challenges to the amount of the fee. *See* 382 F. Supp. 2d at 191; MSEA S.J. Mem. at 8-9.

In any event, plaintiffs are wrong in asserting that MSEA has treated nonchargeable expenditures as chargeable. The only expenditures that plaintiffs claim were treated erroneously in the July Notice are expenses for organizing activities. *See* Pls. Mem. at 33.⁴ Although it is far

⁴ In assailing the *April* Notice, plaintiffs also refer to expenses for “litigation outside of and on behalf of bargaining units other than the Maine bargaining units.” Pls. Mem. at 27. Such expenses also were treated as chargeable in the July Notice, so it is not clear why plaintiffs advance this argument solely with regard to the April Notice. In any event, the argument is wrong, as the caselaw makes clear that “extra-unit litigation” is chargeable. *See* MSEA S.J. Mem. at 10-11. Remarkably (considering that these points were briefed at the preliminary injunction stage), plaintiffs continue to misrepresent the Supreme Court’s discussion of this issue in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991), and plaintiffs persist in failing to mention the three Court of Appeals decisions that have discussed the issue post-*Lehnert*, all of which reject plaintiffs’ argument. *Compare* Pls. Mem. at 27 with MSEA S.J. Mem. at 10-11 and n.8.

from clear that MSEA is constitutionally required to treat organizing expenditures as nonchargeable, *see* MSEA S.J. Mem. at 10 n.7, that is in fact what MSEA decided to do in its July Notice and calculations. *See* MSEA’s Statement of Material Facts as to which there is no Genuine Issue (“Material Facts”) at ¶¶ 16-17 and Belcher Decl. [Dkt. No. 71], Ex. 5.

Plaintiffs declare nonetheless that “MSEA’s disclosure for SEIU persists in claiming that organizing expenditures are chargeable.” Pls. Mem. at 33. But in point of fact, the SEIU report that is included in the July Notice states explicitly that “[a]ctivities that are classified as non-chargeable include . . . organizing.” Belcher Decl. [Dkt. No. 71], Ex. 5 at 26. *See also id.* at 27 (in allocating expenses for conferences and meetings, “[i]tems of a[n] . . . organizing nature are considered to be non-chargeable”); *id.* at 28 (“Expenses allocable to reporting on . . . organizing . . . are considered to be non-chargeable”); *id.* at 29 (expenses of the Unity Fund “are organizing in function and are considered to be fully non-chargeable”).

Despite those unambiguous statements, Plaintiffs maintain that a “close examination” of the July Notice “demonstrates that [MSEA] persists in attempting to compel the Nonmembers to subsidize [SEIU’s] constitutionally nonchargeable organizing activities.” Pls. Mem. at 33. Plaintiffs base that assertion on the fact that the SEIU report, while it treats the entire \$25,070,290 that is listed under the heading of “Organizing” as non-chargeable, lists another \$10,970,866 under the heading of “Organizing campaign support,” and treats \$8,838,146 of that sum as chargeable. *See* Belcher Decl. [Dkt. No. 71], Ex. 5 at 23.

Plaintiffs have overlooked the fact that the reference to “Organizing campaign support” is a typographical error, which SEIU subsequently corrected by inserting the correct names of the departments in question: *Campaign Support and Field Operations*. *See* Declaration of Timothy L. Belcher, dated February 21, 2006, Ex. 2. In other words, the \$10,970,866 line item to which

plaintiffs refer represents the personnel expenses for *all* activities conducted by SEIU's Campaign Support and Field Services Departments, not just support of organizing campaigns. This is reflected in the fact that the report prepared by SEIU for affiliates who choose to treat organizing as chargeable lists all but \$379,062 of that \$10,970,866 as chargeable, *see id.*, Ex. 1 at 13, while the report used by MSEA for the July Notice lists a much larger portion – \$2,132,720 – as nonchargeable, Belcher Decl. [Dkt. No. 71], Ex. 5 at 23. This difference reflects the fact that the SEIU report utilized by MSEA moves all organizing expenses – both those of the Organizing Department itself and those of the Campaign Support and Field Services Departments – to the nonchargeable side of the ledger.⁵

There is no need to belabor the point. Plaintiffs are seeking to parlay a mere typographical error into a constitutional claim. There simply is no legitimate doubt that the

⁵ This explanation concerning the typographical error in the SEIU report is corroborated by three further considerations.

First, the more than \$10 million attributed to “Organizing campaign support” cannot possibly consist entirely of organizing activities, for there is no entry in the report for any of the personnel expenses attributable to the *other* activities of SEIU's field operations. Unless one were to think that SEIU simply omitted all of those expenses (most of which are chargeable) from the report, they must be included in the \$10 million entry.

Second, the erroneous reference to “Organizing campaign support” has a footnote (3a) which states that “[p]ersonnel costs of the organizing departments, *field operations and campaign support departments*, politics, government, and community departments, Union communications departments, leader support departments and the administrative and financial services departments have been allocated based on determinations made by the various department heads as to the percentage of time his or her department spends on chargeable and non-chargeable activities.” Belcher Decl. [Dkt. No. 71], Ex. 5 at 23, 26 (emphasis added). That list of SEIU departments tracks verbatim the list that appears under “Personnel costs” on the page to which plaintiffs are referring, except that what is identified erroneously on that page as “organizing campaign support” is identified correctly in footnote 3a as “field operations and campaign support departments.”

Third, in SEIU's 2002 report, which follows the same general format as the 2003 report, the words “Field operations and campaign support” appear at the precise point where the 2003 report erroneously uses the words “organizing campaign support.” *See id.*, Ex. 3, at 5 [unpaginated] (upper right corner).

service fee calculated in the July Notice excludes MSEA's and SEIU's organizing expenses. To say the least, in the face of the unambiguous statements in the Belcher declaration and in the SEIU report itself that all organizing expenses have been treated as *nonchargeable*, plaintiffs cannot possibly pretend to have established as an undisputed fact that SEIU's organizing expenses have been treated as *chargeable*.

What is more, any attempt on plaintiffs' part to create a factual dispute on this point is unavailing, both as a ground for plaintiffs' own motion and as a basis for opposing MSEA's motion. As this Court correctly reasoned, complaints about the extent of an "advance reduction" are not cognizable at all where fees have been escrowed and will not be spent until challenges to the amount of the fee have been resolved by a neutral arbitrator. *See supra* at 6. Although plaintiffs dispute that principle, they at least acknowledge that "advance reduction" claims cannot be maintained where the question presented is "whether the union correctly allocated expenditures as a matter of *fact* in calculating the fee," but only where the claim is based on a contention that "the standard of chargeability is constitutionally wrong." Pls. Mem. at 28 (emphasis in original). Here, there can be no claim that MSEA used a "constitutionally wrong . . . standard of chargeability"; the *standard* used by MSEA was to treat all organizing expenses as nonchargeable. Plaintiffs' assertion that MSEA failed to apply that standard "*as a matter of fact*" presents no constitutional claim, even on plaintiffs' own theory as to "advance reduction" claims, given that all of the fees in question have been escrowed and will not be spent until any challenges to the amount have been resolved by the arbitrator.

* * * *

For these reasons, all of plaintiffs' *Hudson* claims are meritless as a matter of law.

II. Plaintiffs Lack Standing to Challenge the Indemnification Clause, and Their Challenge Lacks Merit In Any Event

A. Standing

This Court should follow the Ninth Circuit’s well-reasoned opinion in *Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003), holding that where, as in this case, there is no evidence that an indemnification clause caused the alleged *Hudson* violation of which nonmembers complain, the nonmembers lack standing to challenge the indemnification clause.

In our memorandum in support of MSEA’s motion for summary judgment, we showed that *Prescott* is based on well-established principles of standing, and that the lack of standing on the part of the nonmembers to challenge the service fee indemnification clause is, if anything, even more apparent in this case than in *Prescott*. *See* MSEA S.J. Mem. at 12-15. Plaintiffs’ arguments to the contrary are not well taken.

1. Plaintiffs declare that “elementary contract principles” dictate that they must be granted standing to challenge the indemnification clause, because the clause, as part of a collective bargaining agreement, “establish[es] the [nonmembers’] terms and conditions of employment,” and nonmembers necessarily have “standing to challenge one of their terms and conditions of employment.” Pls. Mem. at 15-16.

That argument collapses when it is recognized that not every provision found in a collective bargaining agreement deals with terms and conditions of employment. *See, e.g., NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958) (proposed contract clause establishing procedures to be followed before a union could call a strike would not fall within the category of “wages, hours, and other terms and conditions of employment”). It is common for unions and employers to include provisions in a collective bargaining agreement that are “not . . .

specifically made to, or enforceable by, individual employees.” *Steelworkers v. Rawson*, 495 U.S. 362, 375 (1990). In particular, provisions that deal with relations between the union and the employer, rather than between the employer and its employees, generally do not constitute “terms and conditions of employment,” *Arlington Asphalt Co.*, 136 N.L.R.B. 742, 745-46 (1962), *enf’d*, 318 F.2d 550 (4th Cir. 1963), and an indemnification agreement is a well-recognized example of such a provision. *Id.*

Consequently, there is nothing untoward in the conclusion that MSEA’s commitment to indemnify the State, although contained in a collective bargaining agreement, is “not . . . made to, or enforceable by, individual employees.” *Rawson*, 495 U.S. at 375.⁶

2. Plaintiffs argue that they have standing to challenge the indemnification clause because they object to the entire obligation to pay service fees (what plaintiffs call the “forced-unionism clause”). Pls. Mem. at 16-17. This is a *non sequitur*. Any cognizable injury in this case would stem from the alleged *Hudson* violations, not from the “forced-unionism clause” itself – which plaintiffs cannot and do not contend is unconstitutional – much less from the indemnification clause. *Prescott*, 298 F.3d at 846. And, even if plaintiffs could succeed in striking down the indemnification clause, this would not relieve them of the “forced-unionism

⁶ Moreover, plaintiffs’ suggestion that they might enforce the terms of the indemnification provision as third-party beneficiaries fails as a matter of well-established contract law principles. *See, e.g., Devine v. Roche Biomedical Labs.*, 659 A.2d 868, 870 (Me. 1995) (a third party to a contract provision may enforce its terms only if the language of the contract provision indicates an intent to benefit the third party, or the circumstances “indicate with clarity and definiteness” that the promisee [here, the State] to the contract provision intended to create an enforceable benefit in the third party). Here, neither the language of the indemnification provision, nor the surrounding circumstances, nor common sense provides any suggestion that the State entered into the indemnification provision intending to benefit nonmembers.

clause.”⁷ Consequently, however much plaintiffs may dislike the “*forced-unionism*” clause, they have no standing to challenge the *indemnification* clause.

B. Merits

The indemnification clause in any event is entirely lawful, both as a matter of § 1983 law and as a matter of First Amendment law, for the reasons we have set out in MSEA’s summary judgment motion. *See* MSEA S.J. Mem. at 15-20. We will not repeat those arguments here. We wish only to highlight two fundamental errors in plaintiffs’ analysis of this issue.

1. Plaintiffs overlook the fact that the indemnification clause involved here does not apply to “any intentional deprivation of an individual’s constitutional rights by the State.” *See* Material Facts at ¶¶ 10-11; Affidavit of Kenneth Walo [Dkt. No. 66], Ex. A. Indeed, in quoting the indemnification clause, plaintiffs’ brief *omits the language* that expressly excludes intentional deprivations of constitutional rights from the ambit of the clause, *see* Pls. Mem. at 13 – despite the fact that plaintiffs’ counsel was notified of the fact that the Union and the State had agreed to add this clarifying language to the clause. *See* Declaration of Robert Alexander, dated February 21, 2006, Ex. 2 (the clarified agreement was brought to plaintiffs’ attention in October 2005).

Once it is recognized that the indemnification clause here does not indemnify the State against liability for intentional deprivations of constitutional rights, what plaintiffs have to say about the supposed vices of the clause misses the mark. For example, plaintiffs’ discussion of

⁷ Plaintiffs do not contend that the First Amendment and § 1983 would confer on this Court the authority to strike down the entire service fee provision merely upon a finding that the indemnification clause is invalid; but plaintiffs maintain that that result is dictated by the “severability” provision in the collective bargaining agreement. *See* Pls. Mem. at 17. That contention is misplaced. The severability clause gives the State the right to withdraw from the service fee provision if the State is deprived of the protection of the indemnification clause. This

what they see as the public policy underlying § 1983 is replete with citations to cases involving *intentional deprivations of constitutional rights*, see Pls. Mem. at 9-10,⁸ and plaintiffs refer to the policy of “prevent[ing] encouragement of *intentional torts*,” *id.* at 17 (emphasis added). The indemnification clause here simply does not apply to such cases.

So too, the two Court of Appeals cases on which plaintiffs rely in which service fee indemnification clauses were struck down both involved clauses that – as the courts emphasized – indemnified the public employer even against liability for its own willful constitutional violations. See *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1199-1200 (10th Cir. 2002); *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992).⁹ And the seminal Second Circuit case on which plaintiffs rely (and which was cited by the courts in *Wessel* and *Weaver*) involved a violation that was intentionally discriminatory on its face (paying female coaches less than male coaches),¹⁰ and one from which the employer derived economic benefits. See *Stamford Bd. of Educ. v. Stamford Educ. Ass’n*, 697 F.2d 70 (2d Cir. 1982). Indeed, the Second Circuit has subsequently limited *Stamford* to cases where a party is seeking to be indemnified

is a contractual commitment that is made solely to the employer, not to individual employees, and is enforceable solely by the employer, not by the plaintiffs. See *supra* at 11 and note 6.

⁸ In contrast, § 1983 is not intended to make a governmental entity liable for wrongdoing by persons other than the entity’s official policymakers. See cases cited in MSEA S.J. Mem. at 18.

⁹ Even as to the broad indemnification clauses involved in those cases, *Wessel* and *Weaver* are unpersuasive in their reasoning. See MSEA S.J. Mem. at 19.

¹⁰ See *Gibbs-Alfano v. Burton*, 281 F.3d 12, 22 (2d Cir. 2002) (noting that “the CBA at issue in *Stamford Board of Education* . . . on its very face mandated a discriminatory pay schedule”). Given the nature of the pay schedule involved in *Stamford*, the Second Circuit understandably concluded that the employer’s insistence on being held harmless for “any claimed sex discrimination” in the pay schedule strongly suggested that the employer recognized that the pay schedule was discriminatory. See *Stamford*, 697 F.2d at 71, 74. In contrast, the State’s desire to be indemnified against claims arising out of the implementation of the service fee provisions, other than claims concerning intentional deprivations of constitutional rights by the State, certainly does not suggest that the State viewed the service fee provision itself as unlawful

against liability for its own intentional wrongdoing. *Gibbs-Alfano v. Burton*, 281 F.3d 12, 22 (2d Cir. 2002). Where such intentional wrongdoing is not present, the Second Circuit “see[s] nothing . . . that would preclude enforcement of [an] Indemnification Clause.” *Id.* at 23. And that is particularly true where “the . . . party seeking indemnification was essentially charged with nonfeasance arising from a more culpable party’s malfeasance,” *id.* – which, on plaintiffs’ allegations, is precisely the nature of this case. *See also Andover Newton Theological Sch., Inc. v. Continental Cas. Co.*, 930 F.2d 89, 92 and n.3 (1st Cir. 1991) (under Massachusetts law, public policy proscribes insurance coverage for acts of discrimination only where the insured employer knew that it was committing an unlawful act).

2. The other fundamental flaw in plaintiffs’ analysis – and in the analysis of the *Wessel* and *Weaver* courts – is the assumption that a service fee indemnification clause necessarily will lessen compliance with *Hudson* because “it eliminates one of the most important aspects of legal deterrence: the potential monetary exposure in the complained-of actions and defending against meritorious lawsuits.” Pls. Mem. at 11.

Where, as in this case, the public employer remains financially responsible for any intentional deprivations of constitutional rights in which it is found to have engaged, there remains a strong incentive for the employer to comply with its constitutional obligations. In these circumstances, plaintiffs’ assertion that the indemnification clause caused the State defendants to be “callously indifferent to the Nonmembers’ constitutional rights,” Pls. Mem. at 14, not only lacks any support in the record, *see* MSEA S.J. Mem. at 14-15, but lacks support in logic as well.

(nobody claims that it is) or that the State had some secret foreknowledge that MSEA would commit the (alleged) *Hudson* violations at issue here.

But, even if the Court were to assume – unjustifiably, in our view – that the indemnification clause involved in this case will tend to weaken the *State’s* incentive to comply with *Hudson*, it necessarily would follow that the clause will tend to *strengthen* the *Union’s* incentive to comply, and in equal measure. Plaintiffs (and the courts in *Wessel* and *Weaver*) fail to grasp the significance of this fact.

As the Supreme Court has recognized, deterrence of violations often is best achieved, not by making “most or all wrongdoers” financially responsible, but by placing full financial responsibility on a single actor. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981). To consider only the possible impact of an indemnification clause on the conduct of the *indemnitee* (here, the employer) is to look at only one side of the picture; the possible impact on the conduct of the *indemnitor* (here, the union) is equally relevant.

To be sure, there are some situations – such as where the indemnitor is an insurance company that has no involvement in the activities for which it is providing indemnification – in which indemnification may reduce the indemnitee’s incentive to comply with the law without producing any corresponding increase in any other entity’s incentive to comply. *Cf. Stamford*, 697 F.2d at 74 (noting that a union’s agreement to indemnify an employer against liability for a sexually-discriminatory contract provision might tend to weaken *both* parties’ incentives to comply with the law, because the union could not challenge the provision without subjecting itself to financial liability). But the only case that has considered the net effect of a service fee indemnification clause on the employer *and the union* has concluded that, because it is *the union* “upon whom most obligations fall,” there is no reason to think that an indemnification clause that *increases the union’s financial exposure* is likely, on balance, to reduce compliance with *Hudson*. *Hohe v. Casey*, 956 F.2d 399, 411-12 (3d Cir. 1992). At the very least, in these

circumstances “invalidation of the indemnification clause is not required by the First Amendment.” *Id.* at 412; *see also Wessel*, 299 F.3d at 1199-1200 (McKay, J., dissenting in part).¹¹

Hohe plainly is correct. When a union enters into a service fee indemnification agreement such as is involved in this case, the union knows that any failure to comply with *Hudson* will expose the union to monetary liability not only for any constitutionally impermissible charges to nonmembers, and for the attorneys’ fees incurred by the union and (potentially) by plaintiffs’ counsel, but also for all attorneys’ fees or other costs or liability *incurred by the employer*. As a result, for the union, an indemnification clause of the kind at issue here serves to *enhance* what plaintiffs describe as “one of the most important aspects of legal deterrence: the potential monetary exposure in the complained-of actions and defending against meritorious lawsuits.” Pls. Mem. at 11.

Plaintiffs therefore are not entitled to summary judgment on their claims concerning the indemnification clause. On the contrary, MSEA is entitled to summary judgment on those claims, because plaintiffs lack standing and, in any event, the adoption of the indemnification clause does not constitute a First Amendment/§1983 violation.

¹¹ This is not a case, such as *Stamford*, 697 F.2d at 71, in which one party to an indemnification clause is seeking to enforce the clause against the other party to the clause. In such a case, as in any contract-enforcement case, a court may entertain the defense that the provision on which the plaintiff has sued should not be enforced due to considerations of public policy. It is quite another thing for a nonparty such as the plaintiffs here to bring an action under § 1983 claiming that parties to a contract have *violated the Constitution* by adopting a particular contract provision. In such a case, the plaintiffs cannot prevail merely by invoking “public policy;” plaintiffs must *prove a constitutional violation*. *See* MSEA S.J. Mem. at 16.

CONCLUSION

For the foregoing reasons, as well as those set out in defendant MSEA's motion for summary judgment, the Court should deny plaintiffs' motion for summary judgment.

Respectfully submitted,

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Dated: February 21, 2006

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2006, I electronically filed the foregoing Opposition of Defendant Maine State Employees Association to Plaintiffs' Motion for Summary Judgment 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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