

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.)
)

**DEFENDANT MAINE STATE EMPLOYEES ASSOCIATION’S OPPOSITION TO
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs, all employees of the State of Maine, have brought this action against various state officials and the Maine State Employees Association (“MSEA” or the “Union”) seeking, *inter alia*, to enjoin MSEA’s collection of a service fee from state employees who are represented by MSEA in collective bargaining and grievance arbitration, but have elected not to join the Union (hereinafter “nonmember employees”).¹ Plaintiffs’ Complaint, brought pursuant to 42 U.S.C. § 1983, alleges that such collection would violate their First, Fifth and Fourteenth Amendment rights.

On June 24, 2005, Plaintiffs filed a Motion for Preliminary Injunction, contending that they will be irreparably injured if MSEA’s collection of service fees from nonmember employees—scheduled to commence on July 27, 2005—is not enjoined.

¹ The class definition proposed in the Complaint would also include many employees who have elected to join the Union as members. Complaint at 5; Response of Plaintiffs to Unopposed Motion to Extend Time to Answer Complaint/Respond to Motion to Certify Class at 2-3. *See infra* note 13.

Subsequent to the filing of the complaint and the motion for a preliminary injunction, MSEA has made certain changes in its service fee calculations and procedures which, as we will show in this memorandum, moot most of Plaintiffs' claims and eliminate any colorable argument for a preliminary injunction as to any of the remaining claims. Consequently, the motion for a preliminary injunction should be denied.

I. Statement of Facts

The State of Maine, in accordance with state law, *see Me. Rev. Stat. Ann. Tit. 26, § 979 et seq.*, has recognized MSEA as the exclusive bargaining agent for Plaintiffs and other state employees in the (1) Administrative, (2) Operations Maintenance and Support, (3) Professional and Technical, (4) Supervisory Services, and (5) Law Enforcement Services bargaining units (hereinafter "the Maine bargaining units"). *See* Declaration of Timothy Belcher ("Belcher Decl.") at ¶ 2. As the exclusive bargaining representative of the Maine bargaining units, MSEA must fairly represent the interests of these employees in collective bargaining, and must provide contract administration services, such as grievance processing, for all employees in these units, regardless of their membership status. *Id.*

Prior to 2003, nonmember employees received these services from the Union without paying a service fee. The costs of MSEA's contract negotiation and administration functions were borne entirely by those employees who elected to join the Union. *Id.* at ¶ 3. In 2003 MSEA and the State negotiated a "union security" clause to be included in the 2003-2005 contracts governing the Maine bargaining units. *Id.* at ¶ 4 & Ex. 1. This union security clause provided, *inter alia*, that all *newly-hired* nonmember employees in the Maine bargaining units would be obligated to pay a service fee equivalent to their pro-rata share of union dues, representing the costs that MSEA incurs in providing collective bargaining and contract

administration services on behalf of bargaining unit members. *See* Complaint at Exhibit D(2). The current contracts for the Maine bargaining units—which became effective on July 1, 2005—extend this service fee obligation to *all* nonmember employees in the bargaining units. *See* Belcher Decl. at ¶ 8 & Ex. 2. MSEA will start collecting these service fees from nonmember employees, either through payroll deduction or through direct billing, beginning on July 27, 2005. *Id.* at ¶ 10. However, 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”), will be capped at fifty percent of the otherwise applicable fee amount, through June 2006. *Id.* at ¶ 8 & Ex. 2 at 56.

On April 11, 2005, MSEA mailed all employees in the Maine bargaining units a notice (“April Notice”) informing the nonmember employees that service fee obligations would, under the 2005 contract, be applicable to all employees in the Maine bargaining units after July 1, 2005. Complaint at Exhibit C(1); Belcher Decl. at Ex. 3. This notice provided calculations explaining the basis for the fee, and informed these members of their right to challenge the amount of the service fee as calculated by the Union. *Id.* at 1-2. Because financial information for the Union’s 2004 fiscal year was not yet available at the time that the April Notice was mailed, the supporting documentation included with that notice was based on the Union’s 2003 fiscal year data.² Belcher Decl. at ¶ 12. These supporting documents included: (1) a June 10, 2004 “Notice of Rights Concerning MSEA-SEIU Membership, Dues and Fees,” explaining which categories of union expenditures MSEA considered to be “chargeable” to nonmembers through the service fee, and providing detailed instructions regarding the procedure that

² Because it is impossible to predict in advance precisely what proportion of the Union’s budget will be spent on “chargeable” activities, the percentage used in calculating the service fee is based on accounting figures from the Union’s most recent available fiscal year. Belcher Decl. at ¶ 5.

nonmember employees could use to challenge the amount of the service fee calculated by MSEA; (2) a June 10, 2004 affidavit from MSEA Director of Finance Joan Towle calculating a service fee equivalent to 73.8% of member dues, based on the Union's 2003 fiscal year data; (3) a June 8, 2004 Independent Auditor's Report verifying the accuracy of Towle's calculations; and (4) a September 15, 2003 Independent Auditor's Report for MSEA's parent union, Service Employees International Union ("SEIU" or the "International Union"), providing information regarding SEIU's allocation of expenditures between chargeable and non-chargeable expenses, based on SEIU's 2002 fiscal year data.³ See Complaint at Exhibit C(2); Belcher Decl. at Ex. 3.

Certain nonmembers submitted challenges to the fee, and an arbitration to resolve the challenges is scheduled for October 28, 2005. Belcher Decl. at ¶ 17.

On June 10, 2005, after audited financial figures became available for MSEA's 2004 expenditures, MSEA mailed all members of the Maine bargaining units another notice ("June Notice") again explaining the service fee obligations and providing updated financial information, based on the Union's 2004 expenditures and SEIU's 2003 expenditures. Belcher Decl. at ¶ 13 & Ex. 4. The fee calculated on the basis of those more recent figures was slightly lower than the fee calculated on the basis of the earlier data, and the June Notice informed nonmembers that their fee would be lower than what had been stated in the April Notice. *Id.*

³ MSEA's expenditures include payments to its parent union each year. The proportion of these expenditures that is deemed "chargeable" to MSEA's nonmember employees is based on the percentage of SEIU's budget that is used for chargeable activities. See Complaint at Ex. C(2); Belcher Decl. at Ex. 3 (Affidavit of Joan Towle at ¶ 4(g)). Because some of SEIU's affiliate unions treat organizing expenditures as chargeable to nonmembers while other affiliates treat these expenditures as nonchargeable, SEIU creates two different audit reports each year allocating its budget into "chargeable" and "nonchargeable" categories; one report classifies the International's organizing expenses and transfers to local unions as chargeable, while the other report classifies such expenditures as nonchargeable. Belcher Decl. at ¶ 7. An affiliate union can use whichever of those audit reports is consistent with its reading of the law in determining what percentage of transferred funds to include in its nonmember service fees. *Id.*

On June 16, 2005, Plaintiffs filed the instant action, alleging that the April Notice, and the calculation of service fees detailed in that Notice, did not comply with the requirements established by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), for a constitutionally valid collection of agency fees from nonunion public employees. Complaint at 5-6.

On July 13, 2005, MSEA mailed all nonmember employees a revised notice (“July Notice”), that superceded the April Notice and the June Notice.⁴ Significantly, the July Notice changed the union’s allocation of expenses between “chargeable” and “non-chargeable” activities, by reclassifying the Union’s organizing-related expenditures as non-chargeable to nonmember employees. Belcher Decl. at ¶¶ 14-15 & Ex. 5. In addition to material attached to the June Notice, the July Notice included: (1) a July 11, 2005 affidavit from MSEA Director of Finance Joan Towle recalculating a service fee of 49.13% of member dues (based on the Union’s 2004 fiscal year data); (2) a July 7, 2005 Independent Auditor’s letter verifying the accuracy of Towle’s recalculation; and (3) an October 29, 2004 Independent Auditor’s Report for SEIU, providing information regarding SEIU’s allocation of expenditures between chargeable and non-chargeable expenses based on SEIU’s 2003 fiscal year data, including the auditor’s notes regarding the allocation.⁵ *Id.* at Ex. 5.

Because grandfathered nonmembers like the Plaintiffs will pay only half of the service fee, their payments will amount to only 24.57% of member dues (*i.e.*, half of the 49.13% figure

⁴ This Notice was also mailed to all employees who joined MSEA between April 11, 2005 and the date of issuance of the July Notice. *See* Belcher Decl. at ¶ 21 & Ex. 7.

⁵ Because MSEA determined in the July Notice that it would treat organizing expenses as non-chargeable, the July Notice utilized the SEIU audit report that treated such expenses as non-chargeable. *See supra* note 3 (describing the two different audit reports created by SEIU each year).

calculated in the Towle Affidavit). As a result, each of the Plaintiffs will pay a fee of only \$2.24 per week for the collective bargaining related service provided by the Union. Belcher Decl. ¶ 16.

No collections will be made or sought from nonmembers before July 27, 2005. *Id.* at ¶ 10. Nonmembers who did not choose to challenge the amount of the fee based on the April or June Notices will have an additional opportunity to challenge the reduced fee set forth in the July Notice, and all challenges to the amount of the fee will be considered by the neutral arbitrator at the scheduled October 28 arbitration. *Id.* at ¶ 17. Finally, *all* sums collected from nonmembers pursuant to the service fee notice will be placed in an interest-bearing escrow account until the arbitrator determines the propriety of the union's fee calculations, and only then will any of the fees collected from nonmember employees be released to the Union. *Id.* If the arbitrator determines that any of the amounts paid into escrow should be returned to the nonmembers, those monies will be released to the nonmembers with interest. *Id.*

II. Argument

To merit a preliminary injunction under Fed. R. Civ. P. 65(a), the moving party bears the burden of proving: (1) a likelihood of success on the merits, (2) irreparable injury, (3) that such injury outweighs any harm to the defendant, and (4) that the injunction would not harm the public interest. *Lanier Prof'l Servs., Inc. v. Ricci*, 192 F.3d 1, 3 (1st Cir. 1999); *Keds Corp. v. Renee Int'l Trading Corp.*, 888 F.2d 215, 220 (1st Cir. 1989). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002); *see also Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993) ("In the ordinary course, Plaintiffs who are

unable to convince the trial court that they will probably succeed on the merits will not obtain interim injunctive relief.”).

As we explain below, Plaintiffs have no likelihood of prevailing on the merits of their claims. Plaintiffs’ contention that the *April* Notice included financial information for SEIU that was out of date and incomplete, *see* Pls. Mem. at 4-9, has been mooted altogether by the now-operative *July* Notice. *See infra* at 8-10. The other contention on which Plaintiffs’ motion is based—that MSEA failed to provide a sufficient “advance reduction” in the amount of the fee, *see* Pls. Mem. at 9-12—is a nonstarter because the correct and prevailing view of the law, which has been implicitly adopted by the First Circuit, is that no advance reduction is necessary where, as here, all fees are held in escrow while challenges to the amount are resolved. *See infra* at 11-13. Furthermore, even if an advance reduction were constitutionally required, MSEA has in fact provided the Plaintiffs with a 75% advance reduction, which easily satisfies any conceivable constitutional requirement. *See infra* at 13.

As Plaintiffs cannot establish a likelihood of success on the merits, their motion for a preliminary injunction should be denied.⁶

Plaintiffs Have no Likelihood of Prevailing on the Merits of Their Claims.

It is long established that, because public sector unions provide substantial services to all bargaining unit employees whether or not they are members of the union, the Constitution permits public sector unions, pursuant to agreement with the public employer, to collect service fees representing each nonmember’s pro rata share of the union’s expenses germane to its

⁶ As we briefly explain, Plaintiffs also cannot satisfy the other prerequisites to preliminary injunctive relief; and to the extent that Plaintiffs are seeking to enjoin the collection not only of *service fees* from *nonmembers*, but also *dues* from *Union members*, Plaintiffs’ request is all the more insupportable. *See infra* note 13.

functions as collective bargaining representative, so that nonmembers will not get a “free ride” on the dues paid by union members. *See, e.g., Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 516-18 (1991); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). At the same time, the First Amendment precludes a union from requiring unwilling nonmembers to pay any portion of the union’s expenses for political, ideological, or other “non-germane” activities. *Id.*

A union that intends to collect service fees must establish a procedure for collection that “avoid[s] the risk that [nonmembers’] funds may be used temporarily for an improper purpose.” *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986). This procedure must include: (1) an adequate explanation of the basis for the fee (known as a “*Hudson* notice”), (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 a challenge is pending. *Id.* at 310.

Plaintiffs here allege that MSEA’s agency fee system violates the constitutional rights of nonmembers in two respects. First, Plaintiffs contend that the basis for the fee is not adequately documented in the notice provided to nonmembers. *See* Pls. Mem. at 4-9. Second, Plaintiffs argue that they are constitutionally entitled to a larger “advance reduction” in the amount of the fee. *Id.* at 9-12. However, as we will discuss, both of those allegations are based on elements of the original April Notice that are *not* present in the July Notice, which has completely superseded the earlier notice. Consequently, to whatever limited extent Plaintiffs may have had a colorable claim prior to the issuance of the July Notice, that notice leaves Plaintiffs without even a shadow of a claim, much less a likelihood of prevailing on the merits.

A. The July Notice provides nonmember employees with adequate information

Plaintiffs argue (i) that the financial disclosure information for SEIU that MSEA provided in conjunction with the April Notice—namely, a 2002 SEIU Independent Auditor’s

Report—is “unconstitutionally stale,” because a more recent audit of SEIU was available and could have been provided, Pls. Mem. at 4-9, and (ii) that the April Notice failed to provide nonmember employees with adequate notice and financial disclosure because MSEA transfers a portion of its revenues to SEIU, and “SEIU’s disclosure indicates millions in payments to SEIU affiliates for which no disclosure . . . is provided.” *Id.* at 8; *see also id.* at 5.

Those arguments—whatever merit they may or may not have had at the time Plaintiffs asserted them—are mooted by the July Notice. That notice (and for that matter, the June Notice as well) is based on SEIU’s 2003 data, *not* the 2002 data which Plaintiffs have characterized as “stale.” Belcher Decl. at ¶ 15 & Exs. 4, 5. Because nonmember employees now have been provided the most recent financial information available from SEIU, Plaintiffs’ contention that the April Notice was inadequate because it did not use the most recent information is simply moot.⁷

Plaintiffs’ contention that MSEA’s notice “is constitutionally deficient because SEIU’s disclosure indicates millions in payments to SEIU affiliates for which *no* disclosure whatsoever is provided,” Pls. Mem. at 8 (emphasis by Plaintiffs), likewise is mooted by the July Notice. Plaintiffs apparently are referring to the fact that the April Notice did not disclose the basis on which SEIU treated certain “payments to locals” as chargeable expenditures. *See* Complaint,

⁷ As to both MSEA’s expenditures and those of SEIU, the July Notice uses data from the most recent year as to which an audit has been completed, which is 2004 in the case of MSEA and 2003 in the case of SEIU. *See* Belcher Decl. at ¶ 15. If Plaintiffs mean to suggest that it is impermissible to use different base years for affiliated entities even where the most recent available data is used for each, there is no authority to support such a suggestion, and the suggestion runs counter to *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. In any event, on the facts of this case, this is a nonissue: had MSEA used 2003 as the base year for calculations regarding its own expenditures as well as SEIU’s, the resulting service fee would have been *higher* than the fee that is being charged based on SEIU’s 2003 expenditures and MSEA’s 2004 expenditures. *Compare* Belcher Decl. at Ex. 4 (Affidavit of Joan Towle at ¶ 3) with *Id.* at Ex. 3 (Affidavit of Joan Towle at ¶ 3).

Exhibit C(2).⁸ In the July Notice, however, MSEA has provided the entire SEIU auditor statement of the allocation of expenses for the year ending December 31, 2003, including the auditor's notes. Belcher Decl. at Ex. 5. The notes in that report explain that payments to SEIU's local affiliates were treated as chargeable if made as reimbursements for operating expenses, and non-chargeable if made as subsidies for organizing. *Id.* at 27 (note 3e).⁹ Given that the purpose of a *Hudson* notice is simply to provide information sufficient "to enable the employee to decide whether to object," *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991), the disclosure in the auditor's notes regarding the treatment of SEIU's payments to affiliates is more than sufficient under *Hudson*, and eliminates the issue Plaintiffs have raised concerning the fact that the previous notice did not include such notes.

B. MSEA's advance reduction and escrow procedures for collecting service fees are constitutional

Plaintiffs' second objection to MSEA's collection of service fees is that, in calculating the amount of the fee, MSEA treated as chargeable certain expenses—namely, 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 maintain are not constitutionally chargeable to nonmembers. Pls. Mem. at 9-12. Plaintiffs contend that "[t]his results in much larger agency fee seizures—and a concomitantly inadequate 'advanced reduction'—from the Nonmembers than can legally be permitted." *Id.* at 9 (citation omitted).

⁸ In their brief, Plaintiffs cite to "Complaint, Exhibit D(2), page 3," but the cite should be to "Complaint, Exhibit C(2), page 3."

⁹ Similarly, the "State Council return" expenses questioned by Plaintiffs, *see* Pls. Mem. at 1, are explained in the notes to the SEIU auditors' statement contained in the July Notice. Belcher Decl. at Ex. 5, p. 28 (note 3n).

Plaintiffs' claim is mooted in nearly every respect by the July Notice, which treats expenditures for organizing and publicity relating thereto as non-chargeable.¹⁰ Belcher Decl. at Ex. 5 (Affidavit of Joan Towle at ¶4). But even putting that point aside for the moment, Plaintiffs' claim that MSEA did not provide an adequate "advance reduction" fails to make out a constitutional injury.

1. Caselaw firmly supports the proposition that a union commits no constitutional violation by collecting service fees pursuant to a *Hudson* notice if it holds the disputed portion of the fee in escrow and provides a prompt procedure for adjudication of challenges to the union's

¹⁰ Actually, *publicity* about organizing was not treated as chargeable even in the original April Notice. Although Plaintiffs quote a statement from the April Notice that publicity in support of organizing is "considered chargeable," *see* Pls. Mem. at 9-10, the April Notice unequivocally stated that MSEA and SEIU nonetheless had chosen to treat *all* publicity as nonchargeable. Belcher Decl. at Ex. 3 (Affidavit of Joan Towle). In any event, the July Notice unquestionably treats both organizing and publicity with respect thereto as nonchargeable. *Id.* at Ex. 5 (Affidavit of Joan Towle).

It should be emphasized that, contrary to Plaintiffs' contention, it is far from settled that organizing expenses cannot be charged to 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 non-chargeable. *See* Pls. Mem. at 12. However, *Ellis* was decided on statutory, not constitutional grounds, finding expenditures for organizing to be outside the scope of the service fee authorization provided by Congress in the Railway Labor Act. 466 U.S. at 451-53. And Plaintiffs cite a portion of the *Lehnert* opinion that does not specifically address organizing expenditures at all. Moreover, Plaintiffs cite only 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 has been recognized in a related context that organizing expenditures may properly be charged 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) (holding that under union security provision of National Labor Relations Act, union may charge even dissenting nonmembers for costs related to organizing, because efforts to organize were germane to collective bargaining insofar as they reduced wage competition from nonunion employers). Although MSEA firmly believes that organizing expenditures are germane to collective bargaining for the reasons set out by the Ninth Circuit, it has determined to treat such expenditures as nonchargeable to nonmembers.

calculation of the fee. *See Hudson*, 475 U.S. at 310.¹¹ Following *Hudson*, courts have permitted unions to collect and escrow an amount equivalent to *full union dues* (not merely the calculated estimate of the service fee), without *any* “advance reduction,” so long as the particular collection procedure provides sufficient information to nonmembers and a prompt, neutral method through which nonmembers can challenge the calculation of the fee. *See Grunwald v. San Bernadino City Unified Sch. Dist.*, 994 F.2d 1370, 1372 (9th Cir. 1993); *Pilots Against Illegal Dues v. Air Line Pilots*, 938 F.2d 1123, 1133 (10th Cir. 1991); *Gibson v. The Florida Bar*, 906 F.2d 624, 631 (11th Cir. 1990); *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. 1989); *Andrews v. Education Ass’n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987). *See also Robinson v. State of New Jersey*, 741 F.2d 598, 611 (3d Cir. 1984) (relying on Due Process Clause principles and holding that “[e]ven assuming some cognizable harm occasioned by the temporary deprivation of a small amount of returnable fees exists, adequate post-deprivation procedures may suffice to withstand the constitutional challenge”).

Although the First Circuit has not directly addressed this question in the agency fee context, its decision in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir.

¹¹ Taking a phrase out of context from *Hudson*, Plaintiffs suggest that *Hudson* expressly requires an advance reduction. *See* Pls. Mem. at 5, quoting *Hudson*, 475 U.S. at 309 (stating that the fee collection system in *Hudson* was deficient because “[i]t does not provide “an adequate explanation for the advance reduction of dues”). In context, the *Hudson* Court was *not* holding that an advance reduction, as such, is constitutionally required, but rather that a union must present *an adequate explanation of the basis for its computation of the agency fee*. In *Hudson*, it happened to be the case that the union provided an advance reduction, and the union presented its explanation of the basis for its computation of the agency fee in explaining how the advance reduction had been determined. It was in that context that the Court stated that it was necessary for the union to present “an adequate explanation for the advance reduction.” But what the Court was requiring was *an adequate explanation*, not an advance reduction as such. This is clear from the concluding paragraph of the Court’s opinion, where the Court, in summarizing “the constitutional requirements for the Union’s collection of agency fees,” *id.* at 310, made no mention at all of the need for any advance reduction, but instead referred to the need for “an adequate explanation of *the basis for the fee*.” *Id.* (emphasis added).

1990), strongly suggests that the court would agree with the majority of circuits that there is no constitutional injury in an objection-and-escrow procedure, even if an amount equal to full union dues is originally collected from nonmembers. In *Schneider*, members of Puerto Rico’s integrated bar association challenged a state statute requiring them to join and contribute fees to the state bar association, which used the fees to support ideological causes. The court found that the association’s procedure—whereby it collected the entire amount of bar 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 because the union had failed “to categorize its activities so that an escrow amount [could] be based on actual anticipated expenditures” for non-chargeable activities. *Id.* at 634. Nonetheless, the court—interpreting *Hudson*—determined that the procedure required by the district court in *Schneider*, whereby 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.*

Against all of the authorities which hold that no “advance reduction” of fees is constitutionally required where a union has instituted an objection-and-escrow procedure, the only cases cited by Plaintiffs in which advance reduction has been held to be necessary are a line of decisions from the Sixth Circuit, beginning with *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). The Sixth Circuit’s reasoning has been sharply criticized by other courts, *see, e.g., Grunwald*, 994 F.2d at 1374-75 & n.4 (Kozinski, J.); and as noted, the First Circuit’s decision in *Schneider* indicates that this circuit would agree with the majority position rejecting any requirement of an advance reduction.

2. But, even if an advance reduction *were* constitutionally required, Plaintiffs still would have no likelihood of success on the merits, because MSEA has in fact provided an advance reduction that would satisfy even the Sixth Circuit’s minority view on this issue.

MSEA will escrow *all* funds received from nonmembers, whereas even the Sixth Circuit would allow MSEA to make immediate use of the portion of the fee that is not “reasonably in dispute.” *Tierney*, 824 F.2d at 1506. And, in requiring the nonmembers to make fee payments into the escrow account, MSEA has required Plaintiffs to pay an amount that is only some 25% of union dues. *See supra* at 5. Thus, *nonmembers have received an advance reduction of some 75%*.

That is more than sufficient to satisfy even the Sixth Circuit’s view as to advance reductions. The Sixth Circuit caselaw on which Plaintiffs rely only requires a union to provide an advance reduction that excludes “that portion of the[] fees which an independent audit *unquestionably indicates would be spent for ideological purposes.*” *Tierney*, 824 F.2d at 1503 (emphasis added). Thus, even if this Court were to adopt the Sixth Circuit’s minority view that a union cannot require objecting nonmembers to pay into escrow an amount equal to *full* dues, Plaintiffs still would have to show that the amount they are being required to pay—in this case, a mere 25% of dues—“unquestionably” results in (as Plaintiffs put it) “much larger agency fee seizures . . . from the Nonmembers than can legally be permitted.” Pls. Mem. at 9.

a. On the facts of this case, Plaintiffs have no likelihood of making such a showing. As noted, Plaintiffs contend that they are being charged an amount that exceeds permissible limits because, in computing the service fee (*before* cutting it in half for grandfathered employees like the Plaintiffs), MSEA included as chargeable certain expenses attributable to organizing and “extra-unit” litigation. But, as previously discussed, in the July Notice—the only

notice presently operative—MSEA has recalculated the service fee to exclude expenses attributable to organizing (as well as expenses for publicity concerning organizing, which in point of fact had not been included even in the original calculation of the fee, *see supra* note 10). Thus, the only remaining category that Plaintiffs dispute is so-called “extra-unit litigation” expenses. *See* Pls. Mem. at 10.

Plaintiffs are simply wrong in maintaining that such expenditures are constitutionally nonchargeable to nonmembers. Although Plaintiffs represent 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. Mem. at 10-11, Plaintiffs fail to note that what they quote as *Lehnert’s* holding on this point is in fact Justice Blackmun’s individual opinion, 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 in their brief); *id.* at 507 (opinion of the Court, noting that the final paragraph of Part IV-B of Justice Blackmun’s opinion does *not* constitute the opinion of the Court). And Plaintiffs also fail to note that, in two post-*Lehnert* cases in which their counsel represented the plaintiffs, the Third and Sixth Circuits both recognized that *Lehnert* provides no “definitive Supreme Court guidance” regarding the chargeability of extra-unit litigation expenses. *Otto v. Pennsylvania State Educ. Ass’n.*, 330 F.3d 125, 138 (3d Cir. 2003); *see also Reese v. City of Columbus*, 71 F.3d 619, 624 (6th Cir. 1995) (reading the majority opinion in *Lehnert* to suggest that extra-unit litigation expenses should be treated as chargeable). Plaintiffs fail to inform the Court as well that in both *Otto* and *Reese*, the courts *rejected* the arguments of Plaintiffs’ counsel on this issue and held that extra-unit litigation expenses *are* chargeable after *Lehnert*. *Otto*, 330 F. 3d at 138-39; *Reese*, 71 F.3d at 623-24. *See also International Ass’n of Machinists & Aerospace Workers v. NLRB*,

133 F.3d 1012, 1016 (7th Cir. 1998) (analyzing *Lehnert* and determining that under the National Labor Relations Act the NLRB's determination to permit nonmembers to be charged for extra-unit litigation expenditures was reasonable).

Thus, under a fair reading of the caselaw, Plaintiffs will not prevail on their contention that extra-unit litigation expenses are not constitutionally chargeable.

b. Finally, even if an advance reduction were constitutionally required, and even if Plaintiffs were correct that extra-unit litigation expenses are not chargeable, Plaintiffs *still* would not have shown that MSEA is subjecting them to “much larger agency fee seizures . . . from the Nonmembers than can legally be permitted.” Pls. Mem. at 9. Plaintiffs forget that, because they are “grandfathered,” the amount they are being required to pay into escrow is only *half* of what MSEA has determined to be the constitutionally chargeable portion of the fee. Even if Plaintiffs were correct that MSEA's determination of the constitutionally chargeable amount is excessive to the extent that the calculation includes expenses for extra-unit litigation, it still would be the case that the amount Plaintiffs are *actually being required to pay* into escrow is *not* excessive, because Plaintiffs have been excused from paying half of the so-called “excessive” figure, and this effectively wipes out the portion of the fee that is attributable to extra-unit litigation expenses.¹²

In sum, the 75% advance reduction which MSEA has provided to the Plaintiffs more than satisfies any conceivable constitutional requirements.

* * * *

¹² Indeed, the *entirety* of MSEA's litigation and legal services expenses amounts to only \$79,587, or approximately 4 % of the Union's more than \$2 million in total chargeable expenses. Belcher Decl. Ex. 5 at 10. Thus, expenditures attributable to litigation comprise only 4% of the service fee, far lower than the 50% “grandfather” reduction that all Plaintiffs received.

For all these reasons, Plaintiffs have failed to establish a likelihood of prevailing on the merits of any contention that the service fee procedure which actually will be implemented with respect to them—i.e., the provisions and calculations applicable to “grandfathered” nonmembers set out in the revised July Notice—violate constitutional requirements. Preliminary relief therefore is not warranted.¹³

¹³ Because Plaintiffs’ failure to establish a likelihood of success on the merits is fatal to their motion for a preliminary injunction, there is no need to address the other elements that Plaintiffs would be required to establish (irreparable injury, the balance of the hardships, and the public interest). *See supra* at 6-7. We note, however, that Plaintiffs have cited no case in which irreparable injury was found in a situation where *all* fees paid by nonmembers were escrowed *and* the amount that nonmembers were required to pay into escrow was only half of what the Union had calculated to be the constitutionally chargeable amount. Furthermore, on these facts, any theoretical injury to the Plaintiffs is outweighed by the harm to MSEA of being put in the position of collecting *nothing* from any nonmembers, even into escrow, while the case is pending, and having to attempt to collect after the fact. *See* Belcher Decl. ¶¶ 19-22 and Ex. 6.

Finally, if Plaintiffs’ motion is construed to seek an injunction that prohibits not only the collection of service fees from nonmembers, but also the collection of *dues* from current *members* who joined MSEA after the April Notice, the motion is all the more unsupportable. Plaintiffs acknowledge that it is “unusual” to grant injunctive relief to a putative class before any class has been certified. *See* Pls. Mem. at 16. MSEA has agreed that for purposes of adjudicating Plaintiffs’ motion for a preliminary injunction insofar as *nonmembers* are concerned, the Court may proceed as if a class of nonmembers had been certified. But it would be a far different thing to assume that *members* may be included in any class that might be certified in this case. Even where only nonmembers are involved, courts have pointed out that class certification may be inappropriate in an agency fee case because of possible conflicts between those nonmembers who merely wish to reduce their fee payments without necessarily harming the union, and those who wish to use the litigation as a vehicle to weaken or destroy the union. *See Gilpin* 875 F.2d at 1313. Plaintiffs’ attempt to include in the class individuals who have actually joined MSEA as members pushes the conflict to an unacceptable level, as it defies common sense to suggest that *members* of MSEA support what Plaintiffs are demanding. Indeed, while Plaintiffs seek to represent all employees who recently joined the Union as members, not a single one of those individuals has chosen to be a Plaintiff in this suit.

Even apart from class certification issues, any claims Plaintiffs may be asserting on behalf of members are deeply flawed. Generally, the rights recognized by *Hudson* are rights of *nonmembers*. *See e.g., Kidwell v. Transportation Com. Intern. Union*, 946 F.2d 283 (4th Cir. 1991). Plaintiffs have not identified—much less established through evidence—any way in which the aspects of MSEA’s fee procedures that are the subject of this litigation have any unconstitutional impact on *members*. Employees—both those who are newly hired and are deciding for the first time whether to join MSEA, and those who are considering whether to join the Union after having previously been nonmembers—have many sound reasons for deciding to join MSEA, including not only the desire to support the institution but also the desire to qualify for the benefit programs that come with MSEA membership and the right to participate in governance of the Union. *See* Belcher Decl. at ¶ 22. And Plaintiffs have offered nothing to suggest that employees’ decisions to join MSEA are somehow attributable to what Plaintiffs (erroneously) view as deficiencies in the service fee notice. After all, the notice made it clear that an employee who joined the Union would pay more in dues than the employee would pay in fees if the

CONCLUSION

For the reasons stated in this memorandum, Plaintiffs' motion for a preliminary injunction should be denied.¹⁴

Respectfully submitted,

/s/ Jeffrey Neil Young
Jeffrey Neil Young, Bar No. 463
McTeague, Higbee, Case, Cohen,
Whitney & Toker
4 Union Park
P.O. Box 5000
Topsham, ME 04086-5000
Telephone: (207) 725-5581
Email: JYOUNG@me-law.com

employee remained a nonmember. Thus, it is not reasonable to contend that the April Notice somehow improperly induced employees to become members. And in any event, the July Notice explicitly provides to all members who have joined the Union since the April Notice the opportunity to resign their membership and return to nonmember status. *See* Belcher Decl. at ¶ 21 & Ex. 7. Plaintiffs therefore have no basis for arguing that the Court should enjoin the collection of dues from any individual who is, *and who chooses to remain*, a member of MSEA.

What is more, if the Court were to enjoin collection of dues from members who recently joined the Union, those members would lose their entitlement to the benefits and privileges, noted above, that come with membership in MSEA. Plaintiffs have offered no evidence that any members desire that result—and as noted, any member who *does* wish to return to nonmember status is free to do so under the terms of the July Notice. Members can and should make that decision for themselves.

For all of these reasons, Plaintiffs grossly overreach in attempting to include Union *members* in Plaintiffs' preliminary injunction motion.

¹⁴ If, contrary to our submission, the Court were to grant a preliminary injunction, Rule 65 provides that “[n]o . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). While the posting of a bond is not a jurisdictional prerequisite to the validity of a preliminary injunction, ordinarily the presumption in favor of requiring the posting of a bond is high. *Flag Fables, Inc. v. Jean Ann’s Country Flags*, 730 F. Supp. 1165, 1176 (D. Mass. 1989); *see also Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers*, 679 F.2d 978, 999 (1st Cir. 1982), *rev’d on other grounds*, 467 U.S. 526 (1984) (“[t]he conclusion seems inescapable that once the court decides to grant equitable relief under Rule 65, it must require security from the applicant.” (quoting 11 Wright & Miller, *Federal Practice and Procedure*, § 2954, at 524) (internal quotations omitted)). Although Plaintiffs point out that three other courts – all within the Sixth Circuit – have issued preliminary injunctions in similar cases without requiring bonds, *see* Pls. Mem. at 17, they do not make any showing regarding their ability to pay or the impact on similar litigants that would overcome the presumption in favor of a bond requirement. *See Crowley*, 679 F.2d at 1000 (citing these as factors to consider in deciding whether to require a bond).

*Local Counsel for Defendant
Maine State Employees Association*

Jeremiah A. Collins
Robert Alexander
Lauren McGarity
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, NW
Suite 1000
Washington, DC 20005
Telephone: (202) 842-2600
Facsimile: (202) 842-1888

*Attorneys for Defendant
Maine State Employees Association*

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2005, I electronically filed Defendant Maine State Employees Association's Opposition to Plaintiffs' Motion for Preliminary Injunction 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.

/s/ Robert Alexander
Bredhoff & Kaiser, P.L.L.C.
805 15th Street NW
Suite 1000
Washington, D.C. 20005
(202) 842-2600
ralexander@bredhoff.com