UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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KOUROSH KENNETH HAMIDI, et al.; and the class they seek to represent, Plaintiffs, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000; and BETTY YEE, Controller State of California, Defendants.	Civ. No. 2:14-319 WBS KJN MEMORANDUM AND ORDER RE: MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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Eighteen plaintiffs,[1] who are employees of the State of California, brought this putative class action lawsuit against defendants Service Employees International Union Local 1000

[1] On March 23, 2015, plaintiffs Sandra Kieffer, Angel Lo, and Mozelle Yarbrough stipulated to voluntarily dismiss their claims. (Docket No. 33.) Plaintiffs also withdrew their request that the court appoint plaintiff Cecilia Stanfield to serve as a class representative, although Stanfield remains a named plaintiff in this action. (Id.)

("Local 1000") and the California State Controller.[2] More than a year has passed since plaintiffs filed this case, and no party has yet moved for dismissal or otherwise tested its merits. The instant motion asks the court instead to decide whether this case may be litigated as a class action.

Consequently, this Order addresses only plaintiffs' motion for class certification and appointment of class counsel pursuant to Federal Rule of Civil Procedure 23. It expresses no views on whether plaintiffs have stated a claim upon which the requested relief can be granted or the ultimate merits of plaintiffs' lawsuit.

Local 1000 engages in collective bargaining with the state on behalf of plaintiffs and other public employees. (See Compl. ¶¶ 6, 8, 19 (Docket No. 1)); Cal. Gov't Code §§ 3513(a)-(c), 3520.5. Plaintiffs are not members of Local 1000. (Compl. ¶ 6.) However, plaintiffs must pay a "fair share fee" to compensate it for "fulfilling its duty to represent the employees in their employment relations with the state." Cal. Gov't Code § 3513(k) (defining "fair share fee"); see also 8 C.C.R. § 32990 (defining "agency fee"). The State Controller deducts fair share fees directly from a public employee's wages and remits them to Local 1000 on a monthly basis. See Cal. Gov't Code § 3515.7(b).

[2] At the time plaintiffs filed their Complaint, John Chiang was California's state controller. Betty Yee has since succeeded Chiang to that office and is substituted as a party. See Fed. R. Civ. P. 25(d) (stating that, when a party is an officer sued in his or her official capacity, "the officer's successor is automatically substituted as a party"). For simplicity, the court will refer to this defendant only as the "State Controller."

Plaintiffs challenge the opt out method by which defendants collect fees from non-union members to pay for the union's partisan political and ideological activities. (See Compl. ¶¶ 30-33.) On August 15, 2014, plaintiffs moved for class certification and appointment of class counsel. The class that plaintiffs seek to represent consists of:

> all former, current, and future State of California employees employed in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21 who are, have been, or will be represented exclusively for purposes of collective bargaining by Local 1000, in three subclasses:
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> a. All individuals who pay compulsory fees to Local 1000 who are not members and who have, at one time or another, specifically objected to the use of their union fees for politics or other nonbargaining activities;
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> b. All individuals who pay compulsory fees to Local 1000 who are not members and who have never specifically objected to the use of their union fees for politics or other nonbargaining activities; and
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> c. All individuals who pay compulsory fees to Local 1000 who are not members and who have specifically objected to the use of their union fees for politics or other nonbargaining activities and for whom Local 1000 has, for whatever reason, refused to honor their objections.

(Compl. ¶ 9; Pls.' Mot. at 2.) Plaintiffs state that this class is intended to encompass all potential fee objectors. (Pls.' Mem. at 3.) Plaintiffs also explain that the subclasses included within their proposed definition are for determining the amount of damages only and that all members of the general class share the claims asserted in their Complaint.[3] (Pls.' Reply at 32 &

[3] In light of some confusion regarding plaintiffs' claims, the parties submitted a stipulation to the court on April 20, 2015, clarifying that plaintiffs are pursuing only two

n.38 (Docket No. 51).)

I. Discussion

"For a class to be certified, a plaintiff must satisfy each prerequisite of Rule 23(a) of the Federal Rules of Civil Procedure and must also establish an appropriate ground for maintaining class actions under Rule 23(b)." Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1019 (9th Cir. 2011); see Fed. R. Civ. P. 23. "The party seeking certification has the burden of affirmatively demonstrating that the class meets the requirements of [Rule 23]." Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012) (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

A. Clarification of the Proposed Class

As a preliminary matter, plaintiffs acknowledge some confusion as to the scope of the class they seek to certify. (Pls.' Reply at 31-32.) Plaintiffs state that, because their claims pertain to periods and practices after June 2013, they have no objection to making this time limitation explicit. (Id. at 31; see Stipulation & Order ¶ 4.) The court will therefore modify the proposed class definition to include nonmembers

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claims: First, plaintiffs allege that the opt out system established by California law and Local 1000's June 2013 Notice, requiring nonmembers to notify Local 1000 of their objection to paying for nonchargeable expenses and to renew their objection annually, violates the First Amendment. (See Compl. ¶ 31; Stipulation & Order ¶ 4 (Docket No. 47).) Second, plaintiffs allege that Local 1000 improperly included litigation expenses incurred in an earlier fair share fee case, Knox v. Service Employees International Union, Local 1000, Civ. No. 2:05-02198 MCE KJM, reported at 132 S. Ct. 2277 (2012), in the June 2013 Notice's allocation of chargeable expenses in violation of the First Amendment. (See Compl. ¶ 30, Ex. A at 6; Stipulation & Order ¶ 4.)

represented by Local 1000 "from June 2013 onward."

The court also notes that, as defined by plaintiffs, subclass (c) is a lesser-included group of subclass (a). The court will separate these subclasses by adding to the definition of subclass (a) the phrase "and whose objections were honored." The court retains the power to modify this definition, and it will be the duty of the parties' counsel to call to the court's attention any other necessary adjustments. See Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003).

B. Rule 23(a)

Rule 23(a) restricts class actions to cases where:

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

Fed. R. Civ. P. 23(a). "The Rule's four requirements--numerosity, commonality, typicality, and adequate representation--effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." Dukes, 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted).

A case's merits may be considered only "to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013);

see also Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983-84 & n.8 (9th Cir. 2011) ("The district court is required to examine the merits of the underlying claim in this context, only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims.").

1. Numerosity

"A proposed class of at least forty members presumptively satisfies the numerosity requirement." Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450, 456 (C.D. Cal. 2012); see also, e.g., Collins v. Cargill Meat Solutions Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wanger, J.). Subclasses (a) and (b) thus easily satisfy numerosity. (See Calderia Decl. ¶ 11.)

Local 1000 challenges only the numerosity of subclass (c), the "attempted objector" subclass. (Local 1000's Opp'n at 34-35 (Docket No. 39).) However, in light of plaintiffs' clarification that all general class members will assert the same two claims, (see Pls.' Reply at 32), the court concludes that numerosity is satisfied as to the general class and will proceed to the next requirement.

2. Commonality

Commonality requires a lawsuit to "depend upon a common contention" that is "capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 131 S. Ct. at 2551. "What matters to class certification . . . is not the raising of common 'questions'--even in droves--but, rather the capacity of a classwide

proceeding to generate common answers apt to drive the resolution of the litigation." Id. "To assess whether the putative class members share a common question . . . [the court] must identify the elements of the class members' case-in-chief." Stockwell v. City & Cnty. of San Francisco, 749 F.3d 1107, 1114 (9th Cir. 2014)

a. Facts Relevant to Commonality

The parties do not dispute application of the same opt out procedure to all nonmember public employees. By default, fair share fees deducted from public employees' wages reflect both a union's collective bargaining and non-collective bargaining expenditures. See Cal. Gov't Code §§ 3513(k); 3515.7. However, nonmembers may demand a return of the portion of the fee used "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." Id. § 3515.8.

In late May or June 2013, Local 1000 sent nonmembers a Notice to Fair Share Fee Payers ("June 2013 Notice"). (Compl. Ex. A (Docket No. 1-1); Decl. of Brian Caldeira ("Calderia Decl.") ¶¶ 3, 6 (Docket No. 37).) All nonmembers faced the same opt out procedure, as explained in the notice, for raising an objection should they wish to avoid the fee associated with political or ideological expenditures. (Caldeira Decl. ¶ 7.) Local 1000 identified those individuals who objected for the State Controller. (Id. ¶ 8.) The State Controller then deducted either a full fee or a reduced fee from all nonmember public employees' wages pursuant state law. (See id. ¶ 11.)

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b. Plaintiffs' First Claim Satisfies Commonality

Plaintiffs' first claim "advances the theory that a union is not permitted to seize from any 'potential objector' fees exceeding those which serve a compelling state interest--i.e., those for constitutionally-chargeable costs--absent their affirmative consent." (Pls.' Reply at 24; see Compl. ¶¶ 31-33.) Language from the Supreme Court's recent decision in Knox invites such a challenge, plaintiffs say. See Knox v. Serv. Empl. Int'l Union, Local 1000, 132 S. Ct. 2277, 2289-91 (2012). The court therefore understands this claim, like the claim in Knox, to allege the opt out procedure does not comply with Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986).

Before Knox reached the Supreme Court, the Ninth Circuit employed a "balancing test" in Hudson challenges. 628 F.3d 1115, 1119-20 (9th Cir. 2010), rev'd and remanded, 132 S. Ct. 2277 (2012). The Supreme Court clarified the standard in Knox by stating,

> Far from calling for a balancing of rights or interests, Hudson made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest.

132 S. Ct. at 2291 (internal citations omitted). Application of this standard to the present case reveals at least two core questions of law common to the class: (1) whether the opt out

procedure serves a compelling state interest and (2) whether that interest cannot be achieved through significantly less restrictive means. See Knox, 132 S. Ct. at 2291 & n.3; Hudson, 475 U.S. at 303. Accordingly, sufficient commonality exists to resolve plaintiffs' first claim for all class members at the same time. See Dukes, 131 S. Ct. at 2551-52.

c. Plaintiffs' Second Claim Lacks Commonality

There is a "clear distinction between the adequacy of a union's notice addressed by the Supreme Court in Hudson, and the propriety of a union's chargeability determinations." Wagner v. Prof'l Eng'r in Cal. Gov't, 354 F.3d 1036, 1046 (9th Cir. 2004) (quoting Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813-14 (9th Cir. 1997)). Case law addressing chargeability determinations "categorically prohibit[s] only one type of First Amendment harm: use of nonmembers' money to promote causes they do not believe in." Grunwald v. San Bernardino City Unified Sch. Dist., 994 F.2d 1370, 1375 (9th Cir. 1993) (emphasis added); see also Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps., 466 U.S. 435, 456 (1984) ("Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint."). Unless the class as a whole opposes the union's political activities, "[t]his is not and cannot be a class action." Bhd. of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emp. v. Allen, 373 U.S. 113, 119 (1963).

There is no evidence that the proposed class as a whole opposes the union's political activities. If every potential objector must prove that he or she subjectively disagrees with

the union on political grounds--as opposed to some other reason for not wanting to pay the fee--in order to obtain relief, this claim lacks a common contention "capable of classwide resolution . . . in one stroke." Dukes, 131 S. Ct. at 2551. Accordingly, because plaintiffs have failed to prove commonality as to their second claim, the court will decline to certify it. The rest of this Order address only plaintiffs' first claim.

3. Typicality

"The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Ellis, 657 F.3d at 984 (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)).

The prior analysis of commonality supports the conclusion that plaintiffs' first claim is typical of absent class members'. See Dukes, 131 S. Ct. at 2551 n.5 (noting that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge"). However, to the extent plaintiffs assert an "as applied" challenge to the opt out procedure in addition to their facial First Amendment challenge, (see Compl. at 13), plaintiffs have presented no evidence of the typicality of that theory.[4]

[4] Defendants have provided the court with deposition testimony from several named plaintiffs suggesting they did not receive the June 2013 Notice for various reasons. Many named plaintiffs say they may have thrown notices from various years away unopened after mistakenly believing the notices were union membership solicitations. (See, e.g., Ammons Dep. at 115-116 (Docket No. 40); Blaylock Dep. at 155-56 (Docket No. 40); Giles Dep. at 82-84, 87-88 (Docket No. 40); Lopez Dep. at 99-104 (Docket No. 40).) Other plaintiffs relocated their residences

See Legal Aid Servs. of Or. v. Legal Servs. Corp., 608 F.3d 1084, 1096 (9th Cir. 2010); Baird v. Cal. Faculty Ass'n, Civ. No. S-00-0999 WBS DAD, 2000 WL 1028782, at *4 n.2 (E.D. Cal. July 13, 2000) (declining to certify an as applied class because plaintiffs presented no evidence of typicality). Accordingly, the court will deny certification at this time of plaintiffs' first claim in so far as it asserts an as applied challenge.

Defendants point to the fact that many class representatives submitted fee objections, whereas others did not. (See, e.g., Hamidi Dep. at 102, 107-09, 115 (Docket No. 40); Christensen Dep. at 57-58 (Docket No. 40).) "The suggestion that actual objectors cannot represent a class of potential objectors has already been rejected in this District." Knox, 2006 WL 3147683, at *3 (citing Friedman v. Cal. State Emps. Ass'n, Civ. No. S000101 WBS GGH, 2000 WL 288468, at *5 (E.D. Cal. Mar. 15, 2000)). Plaintiffs and absent class members are similarly situated with respect to the objection procedure afforded them.

Local 1000 also argues that plaintiffs are not typical of the class because they differ from many absent class members in their reasons for refraining from union membership and in their opposition to Local 1000's political activities. (Local 1000's Opp'n at 10-12.) Local 1000 raises these arguments in the

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around the time the June 2013 Notice was mailed. (See, e.g., Ollis Dep. at 70-83, 106-07 (Docket No. 40); Giles Dep. at 90-91, 95-98 (Docket No. 40).) Still others were out of state on military duty, (Browne Dep. at 63, 92, 100-104, 118-19 (Docket No. 40)), had just resigned from union membership at the time the notice was sent, (McElroy Dep. at 109 (Docket No. 40)), or stated that a neighbor or roommate may have collected the mail on the day the notice was received and never alerted its intended recipient, (see Giles Dep. at 85-86; Browne Dep. at 109).

adequacy of representation prong of Rule 23(a)(4) as well. The court therefore addresses them below.

4. Adequacy of Representation

To fairly and adequately protect the interests of the class, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." E. Tex. Motor Freight v. Rodriguez, 431 U.S. 395, 403 (1977) (internal quotations omitted). "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" Ellis, 657 F.3d at 985 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)).

a. Conflicts of Interest

Local 1000 has presented the court with thirty-one declarations from individuals it says are putative class members.[5] The union argues these declarations prove a conflict

[5] There is no evidence before the court explaining how Local 1000 came by these declarations or what motivated the declarants to make them. Several declarants say that they chose to pay the full fair share fee, including the portion that funds nonchargeable expenditures, because they support Local 1000's political activities. (See, e.g., Gaeta Decl. ¶¶ 2, 4 (Docket No. 35); Lee Decl. ¶¶ 3-4 (Docket No. 35); Pischalnikoff Decl. ¶¶ 2-4 (Docket No. 35).) Some declarants say they simply do not care to take the time to object. (See, e.g., Turner Decl. ¶¶ 3-4 (Docket No. 35) Smith Decl. ¶ 4 (Docket No. 35).) Other declarants say they chose to become objectors for financial reasons while still approving of Local 1000's political activities. (See, e.g., Cerda Decl. ¶ 3 (Docket No. 35); Fuzesi Decl. ¶¶ 4, 6 (Docket No. 35); Jonason Decl. ¶¶ 3, 5 (Docket No. 35); Ramirez Decl. ¶ 2 (Docket No. 35).)

between the interests of absent class members and the relief plaintiffs seek in this lawsuit. (Local 1000's Opp'n at 28.)

The court hesitates to draw this conclusion from the evidence before it. Only one of the thirty-one declarations states a preference to retain the opt out procedure. (See Johnson Decl. ¶ 7 (Docket No. 35) ("I prefer to have an opt-out system so that I can contribute to political activities without having to opt-in every single year.").) However, the Ninth Circuit has rejected this kind of argument against class actions. See Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 779-81 (9th Cir. 1986) (concluding "the fact that there may be some who would prefer that [an annuity retirement plan] remain in operation" does not constitute a conflict of interest preventing class certification). A mere preference does not properly "conflict" with plaintiffs' constitutional interests such that it renders the representative parties inadequate. See id. at 781. If the opt out procedure is found unconstitutional, it will be unconstitutional notwithstanding the fact that some would prefer it. See id.

All other declarants speak only in sweeping generalities that do not explicitly address whether they favor an opt out procedure or oppose a refund of fair share fees. Support for a strong union, (see George Decl. ¶ 3 (Docket No. 35)), approval of the union's political activities, (see Gaeta Decl. ¶¶ 2, 4), or the view that the current opt out process is straightforward, (Moreno Decl. ¶ 5 (Docket No. 35)), does not necessarily conflict with plaintiffs' goal in this lawsuit. For example, an individual may favor both a strong union and an opt

in procedure for contributing to political activities--the two views are not mutually exclusive. The court therefore declines to speculate about views the declarants have not expressed.[6]

Local 1000 also points to Gilpin v. AFSCME, AFL-CIO, 875 F.2d 1310 (7th Cir. 1989). Gilpin affirmed a lower court's denial of class certification in a fair share fee case because the full "restitution" remedy sought by the plaintiffs potentially conflicted with the interests of free riders within the class. See id. at 1313.

Plaintiffs' prayer for relief does not seek the remedy at issue in Gilpin. Compare Gilpin, 875 F.2d at 1313 ("The [plaintiff] is seeking repayment to all the bargaining unit's nonunion employees of the entire agency fees collected by the union in the 1985 and 1986 school years . . . ."), with Compl. at 14 (seeking "the amount of agency fees improperly deducted from their wages"). Moreover, full restitution of the entire fair share fee is unavailable in the Ninth Circuit. See Prescott v. County of El Dorado, 177 F.3d 1102, 1109-10 (9th Cir. 1999). Gilpin is therefore distinguishable. See Cummings, 316 F.3d at 895-96 (affirming this court's prior decision to distinguish Gilpin on similar grounds).[7]

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[6] Local 1000 may wish the court to draw the speculative inference that an individual who says he or she favors a strong union also disfavors a refund of nonchargeable fair share fees. The court follows well-established Ninth Circuit precedent in declining to deny class certification on this basis. See Soc. Servs. Union, Local 535 v. Santa Clara Cnty., 609 F.2d 944, 948 (9th Cir. 1979) ("Mere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification.").

[7] The State Controller also argues that named plaintiffs

b. Vigorous Prosecution on Behalf of the Class

Local 1000 next argues that the representative plaintiffs are not adequate because they do not understand their fiduciary duties to absent class members or the goal of this lawsuit. (Local 1000's Opp'n at 12-16, 22-27.) It bases this contention on deposition testimony of the named plaintiffs suggesting that seven of them did not understand the term "class representative" or other legal terminology, (see, e.g., Tutt Dep. at 26-27 (Docket No. 40); Giles Dep. at 23-24 (Docket No. 40); Sarumi Dep. at 38-39 (Docket No. 40)), and others did not understand the exact extent of the class they seek to represent, (see, e.g., Blaylock Dep. at 52-53 (Docket No. 40); Browne Dep. at 27 (Docket No. 40)).

Taken in context and without reliance on legal jargon, however, the representative plaintiffs displayed an appropriate understanding of the aims of this lawsuit and their role in it.[8]

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are inadequate because they seek to represent bargaining units in which none of them work. (State Controller's Opp'n at 7-8.) The State Controller cites no authority supporting the proposition that a named plaintiff must have the same or similar occupation as class members, nor does it explain the relevance that a particular bargaining unit may have on the ability of the representatives to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Accordingly, this argument is unpersuasive.

[8] (See, e.g., Ammon Dep. at 27-28 ("Q: Do you have an understanding if you're asking the Court to appoint you as a representative of other people in this case? A: Yes."); id. at 35, 40 ("Q: Do you think it is fair for all of the members in the bargaining unit to pay their fair share of the costs of that bargaining? A: As long as it's going for our bargaining."); Blaylock Dep. at 51 ("My goal is . . . answer the question that the Supreme Court left open, why do I have to opt out of something."); Browne Dep. at 31 ("My understanding is that everyone is required to at least pay a little bit of those

Plaintiffs also demonstrated knowledge of the fair share fee, the opt out procedure, and other facts relevant to their claims.[9] Accordingly, these class representatives can vigorously prosecute and direct this lawsuit on behalf of absent class members.

To the extent some plaintiffs misunderstand legal terms or litigation strategy, Local 1000 has not provided, and the court has not found, any authority that requires them to have such knowledge. To the contrary, judges in this district have found named plaintiffs competent to serve as class representatives based on their retainer of qualified, experienced attorneys to advise them and act on their behalf. See, e.g., Dei Rossi v. Whirlpool Corp., Civ. No. 2:12-00125 TLN, 2015 WL 1932484, at *5-6 (E.D. Cal. Apr. 28, 2015) (finding adequate representation in part because "[p]laintiffs are represented in this case by prominent law firms with extensive experience in complex and class action litigation"); see also Hanlon, 150 F.3d at 1021 ("Although there are no fixed standards by which 'vigor'

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expenses, since on paper everyone benefits from that. . . . I think that is fair as long as the amount is correct and has been decided fairly and is -- and the money is only to be used for collective bargaining."); Giles Dep. at 20-21 ("[W]e are hoping to change that instead of having to opt out of fees, that we would have to opt in to fees. . . . This is a class-action suit, so there are others that are in the class with me. . . . Similar employees with a similar complaint."); Sarumi Dep. at 31 ("Q: Are you asking the court to certify a class of people who will benefit from this lawsuit? A: That is correct."); Tutt Dep. at 21 ("I am part of this [lawsuit] because I believe that it is not fair that the union makes us opt out every single year. . . . I don't want to pay for your advertising and the other things that you do.").

[9] (See, e.g., Ammon Dep. at 36-41; Browne Dep. at 28-31; Giles Dep. at 24-27, 39-40; Tutt Dep. at 21.)

can be assayed, considerations include competency of counsel . . . .").

Turning to counsel, plaintiffs are represented by W. James Young of the National Right to Work Legal Defense and Education Foundation, Inc. Young has served as trial and appellate counsel for several class actions, (see Young Decl. ¶ 9 (Docket No. 22-2)), including Knox, which was litigated out of this district, see 2006 WL 3147683, at *4. Local 1000 does not contest Young's competence. (Local 1000's Opp'n at 24 n.40.)

Accordingly, because the court finds no conflicts of interest and is confident that plaintiffs and their counsel will vigorously prosecute this case on the class's behalf, the court concludes that the representative parties will fairly and adequately protect the interests of the class. See Ellis, 657 F.3d at 985. The court further finds Young an appropriate class counsel under the factors listed in Rule 23(g)(1) and will therefore appoint him to that position. See Fed. R. Civ. P. 23(g).

C. Rule 23(b)

Plaintiffs request certification under subsection (b)(1)(A), (b)(2), or, in the alternative, (b)(3). The proposed class meets the criteria of Rule 23(b)(2). The court therefore need not address whether it meets the criteria of subsection (b)(1)(A) or (b)(3).

Rule 23(b)(2) allows maintenance of a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is

appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Subsection (b)(2) was designed largely to permit maintenance of a class action as a vehicle for the redress of civil rights violations." Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 102 F.R.D. 457, 462 (N.D. Cal. 1983) (citing Alliance to End Repression v. Rochford, 565 F.2d 975, 979, n.9 (7th Cir. 1977)).

Subsection (b)(2) addresses injunctive and declaratory relief only, not monetary damages. In Dukes, the Supreme Court held that claims for "individualized" monetary relief cannot be maintained under (b)(2). Dukes, 131 S. Ct. at 2557-61. The Court explained:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted--the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. . . . [I]t does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Id. at 2557 (internal quotation marks and citations omitted). The Supreme Court did not decide, however, whether "incidental" monetary relief is consistent with subsection (b)(2). Id. at 2560; see also Wang v. Chinese Daily News, Inc., 737 F.3d 538, 544 (9th Cir. 2013).

Plaintiffs seek injunctive and declaratory relief as well as monetary damages for "the amount of agency fees improperly deducted from their wages" and nominal damages. (See Compl. at 14; Pls.' Reply at 32 n.38.) They argue these damages are not the kind of "individualized" damages banished from

subsection (b)(2) by Dukes because a refund of deducted fees will flow directly from the injunctive and declaratory relief they seek. (Pls.' Reply at 32-33.)

For an example, plaintiffs point to the court's award of damages in Knox. After the Supreme Court remanded that case to this court, Judge England ordered: "Defendant [Local 1000] shall refund to Plaintiffs all monies exacted for the 'Emergency Temporary Assessment to Build a Political Fight-Back Fund,' for the entirety of the period during which the assessment was exacted, plus interest." Knox, 2013 WL 2434606, at *3.

The court agrees that a similar order would not amount to individualized damages under Dukes because its "indivisible nature" comports with the "key to the (b)(2) class." See Dukes, 131 S. Ct. at 2557. The court will therefore grant class certification pursuant to Rule 23(b)(2). If additional hearings or individualized determinations become necessary at some later time, the court will modify or decertify the class. See Cummings, 316 F.3d at 896.

Mindful of its limited ability to consider a claim's merits for purposes of this motion, see Amgen, 133 S. Ct. at 1195, the court expresses no views on whether the monetary damages plaintiffs request are available under claim one. No party has moved for dismissal or properly asked the court to address that question. See Cummings v. Connell, 177 F. Supp. 2d 1060, 1068-73 (E.D. Cal. 2001) (addressing the compensability of claims and appropriate relief on motion for summary judgment). Accordingly, the court will not consider it here.

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II. Conclusion

Plaintiffs' first claim has satisfied all the prerequisites of Rule 23(a) and has met the criteria of Rule 23(b)(2). Accordingly, the court will certify the class, naming the requested plaintiffs as class representatives and appointing class counsel.

IT IS THEREFORE ORDERED that plaintiffs' motion for class certification and for appointment of class counsel be, and the same hereby is, GRANTED in part and DENIED in part. The court certifies only plaintiffs' first claim to the extent it asserts a facial First Amendment challenge. The court denies without prejudice (1) certification of plaintiffs' first claim to the extent it asserts an as applied First Amendment challenge and (2) certification of plaintiffs' second claim.

The certified class shall consist of:

> all former, current, and future State of California employees employed in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21 who are, have been, or will be represented exclusively for purposes of collective bargaining by Local 1000, from June 2013 onward, in three subclasses:
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> a. All individuals who pay compulsory fees to Local 1000 who are not members and who have, at one time or another, specifically objected to the use of their union fees for politics or other nonbargaining activities, and whose objections were honored;
>
> b. All individuals who pay compulsory fees to Local 1000 who are not members and who have never specifically objected to the use of their union fees for politics or other nonbargaining activities; and
>
> c. All individuals who pay compulsory fees to Local 1000 who are not members and who have specifically objected to the use of their union fees for politics or other nonbargaining

activities and for whom Local 1000 has, for whatever reason, refused to honor their objections.

The court appoints plaintiffs Hamidi, McElroy, Ammons, Blaylock, Browne, Christensen, Giles, Lopez, Miller, Morrish, Ollis, Sarumi, Toledo, and Tutt as class representatives and further appoints W. James Young as class counsel.

Dated: May 22, 2015

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE