**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Tayah Lackie,

Plaintiff,

vs.

Minnesota State University Student Association, Inc. d/b/a Students United; St. Cloud University; Robbyn R. Wacker, in her personal and official capacity as President of St. Cloud State University; and Larry Lee, in his personal and official capacity as Vice President for Finance and Administration at St. Cloud State University,

Defendants.

Civil File No. 24-cv-01684 (JWB/LIB)

**MINNESOTA STATE UNIVERSITY STUDENT ASSOCIATION, INC. D/B/A STUDENTS UNITED'S REPLY MEMORANDUM**

Minnesota State University Student Association, Inc. d/b/a Students United (hereafter "Students United") submits this Reply Memorandum in response to Plaintiff's Memorandum of Law in Opposition to Student United's Motion to Dismiss and in further support of its Motion to Dismiss.

## ARGUMENT

### I. Students United Was Not Engaged In A "Joint Activity" With SCSU Or The State.

The Supreme Court has explained that its cases have attempted to plot a line between state action subject to the Fourteenth Amendment, and private conduct that is not. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). The court further explained that the court's obligation is to "'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of

responsibility on a State for conduct it could not control," while also assuring that "constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* (citations omitted; italics in original). Thus, as Plaintiff acknowledges, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behaviors 'may be fairly treated as that of the State itself.'" *Id.* (citations omitted).

Plaintiff and Students United agree that in order for Students United, a private organization, to be constrained by the First and Fourteenth Amendments, it must be shown to have been acting as a state actor. That means Students United's actions must be "fairly attributable" to the State, which requires consideration of two questions: 1) whether the claimed deprivation was "caused by the exercise of some right or privilege created by the State or by rule of conduct imposed by the state or by a person for whom the state is responsible; and 2) whether the party charged with the deprivation is "a person who may fairly be said to be a state actor." *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 940 (1982) (also stating the questions as "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority" and "whether, under the facts of [the] case, [defendant], who [is a] private part[y], may be appropriately characterized as [a] 'state actor[ ]'").

As Plaintiff correctly notes, Students United does not dispute that the Complaint satisfies the first question, as Students United's receipt of student fees and membership was based on a statute. Instead, the issue is with the second question.

Both Plaintiff and Students United acknowledge that private parties have been found to be acting as a state actor in certain circumstances, including when the private party acts jointly with a government actor, the factor upon which Plaintiff relies. *See e.g., Manhattan Com. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019); *Meier v. St. Louis*, 934 F.3d 824, 829 (8th Cir. 2019). Specifically, Plaintiff contends that because SCSU deducted statutorily authorized student fees on behalf of Students United, which were then paid to Students United to use as it determined, Students United was acting jointly with the state such that Students United can be fairly characterized as a state actor.

Plaintiff looks somewhat extensively to the *Janus* decisions, however, where the Seventh Circuit court recognized that the Supreme Court was "not concerned in the abstract with the deduction of money from employees' paychecks, but with the use of that money to support the union's representation work. *See Janus v. AFSCE*, 942 F.3d 352, 357 (7th Cir. 2019). That is, "the case presented a First Amendment speech issue, not one under the Fifth Amenment's Takings clause." *Id*.

Similarly, Plaintiff's issue is not really with the fact that some nominal amount of fees were assessed to her, but with the fact that those fees helped fund Students United's advocacy on issues with which she disagreed. Plaintiff, however, fails to allege that such advocacy was closely connected to the State, such that it can fairly be attributed to the State or that Students United can be found to be a state actor.

In order to convince the Court that the requisite "joint activity" is present, Plaintiff briefly discusses a handful of cases from the Supreme Court and Eighth Circuit, generally emphasizing a phrase included within the court's decision. Plaintiff then uses those phrases

throughout her Opposition Memorandum, though the Complaint is noticeably silent as to any assertions that Students United "acted jointly," "cooperated," or "acted in partnership with" SCSU and/or that there was a "meeting of the minds" between Students United and SCSU with regard to the assessment of statutorily required fees. In fact, when the complete facts upon which the "joint activity" determinations were made in the Supreme Court and Eighth Circuit cases upon which Plaintiff relies are considered, it is quite apparent that the State was far more involved in the activities at issue than is present here.[1]

In *Lugar*, the petitioner was indebted to Edmondson Oil Co., which sued on the debt in state court. 457 U.S. at 924. Pursuant to state law, Edmondson also sought prejudgment attachment of petitioner's property, which required only that Edmonson allege in an *ex parte* petition a belief that petitioner was or might dispose of his property to defeat his creditors. *Id*. The state court clerk, acting on Edmonson's *ex parte* petition, issued a writ of attachment, which was then executed by a county sheriff. *Id*. A hearing on the attachment and levy was thereafter conducted, and the trial judge ordered the attachment dismissed based on a failure of evidence. *Id*. at 925.

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[1] Plaintiff, of course, also looks to the Seventh Circuit's decision, *Janus v. AFSCE*, 942 F.3d 352, 361 (7th Cir. 2019), but it is worth noting that the court's "state actor" analysis is sparse and seemingly blurs the two "fair attribution" questions together. While the Seventh Circuit indicated that it was analyzing the second "state actor" or "under color of law" question, the language it cites from *Lugar* relates to the first "state authority" question. *Id*. The court quoted from *Lugar* that "[a] 'procedural scheme created by . . . statute obviously is the product of state action' and 'properly may be addressed in a section 1983 action,'" but the Seventh Circuit left off the language that immediately followed, which was "if the second element of the state-action requirement is met as well." *Id*. and *Lugar v. Edmondson Oil Co., Inc*.457 U.S. 922, 361 (1982).

Lugar brought a § 1983 claim against Edmonson, alleging that in attaching his property, it had acted jointly with the state to deprive him of his property without due process. *Id.* The Supreme Court, after setting out the two "fair attribution" questions, found invoking the aid of state officials to take advantage of state-created attachment procedures was sufficient to show joint participation when the state has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute. *Id.* at 942. Thus, the court determined that Lugar was deprived of his property through state action, and Edmonson was acting under color of state law when participating in that deprivation. *Id.*

In *Meier v. St. Louis*, a St. Louis Metropolitan Police Department (SLMPD) officer asked a SLMPD clerk to report a truck suspected as being involved in a hit-and-tun as wanted on a computer network used by law enforcement to share information. 934 F.3d at 826. An officer from another department (MHPD) thereafter saw Mary Meier's son sitting in the truck, looked it up, and saw it was wanted by SLMPD. *Id.* at 827. The officer directed dispatch to arrange for the truck to be towed, and MHPD arranged for Doc's Towing to pick up the truck. *Id.* After receiving notice, Meier and her son went to Docs's Towing to get the truck, but an employee advised that while MHPD had released the truck, SLMPD still had a hold on it and, therefore, it could not be released. *Id.* Eventually, with the help of an attorney, SLMPD issued a release order, which was faxed to Doc's Towing, which then allowed Meier to retrieve the truck. *Id.*

Meier sued the City of St. Louis and Doc's Towing, claiming they violated her Fourth and Fourteenth Amendment rights by towing and storing the truck. *Id.* at 826.

Doc's Towing argued there was no "close nexus" between St. Louis and its detention of the truck. *Id*. at 829. The Eighth Circuit court, however, explained that a jury could find that SLMPD intended for Doc's Towing to detain the truck until it obtained information it was looking for and authorized the truck's release, and that Doc's Towing understood that intent and acted accordingly. *Id*. at 829-30. In fact, Doc's Towing's policy was not to release a vehicle with a hold or wanted designation without police authorization and, accordingly, once it received such authorization from SLMPD, it released the truck. *Id*. at 830. The court found that the evidence indicated SLMPD and Doc's Towing shared a mutual understanding concerning the truck, and Doc's Towing willfully participating in SLMPD's policy, such that a jury could find Doc's Towing was acting under color of law when it refused to allow Meier access to her truck. *Id*.

At issue in *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, was InnerChange, a Christian-based residential inmate program that operated within a medium-security facility. 509 F.3d 406, 413 (8th Cir. 2007). InnerChange staff supervised inmates in classes, activities, and recreation. *Id*. at 416. The DOC also authorized InnerChange staff to write and issue disciplinary reports on inmates participating in the program, and after a certain number of such reports were issued, a DOC officer would then issue a report indicating a serious rule violation. *Id*. Per a contract entered into between InnerChange, its affiliate, and DOC, the DOC would pay and/or reimburse non-religious costs and expenses as well as pay salaries and benefits for InnerChange's personnel on a percentage basis, with such reimbursement amounts being deposited into InnerChange's bank account. *Id*. at 417-419.

The Eighth Circuit, considering whether InnerChange could be considered a state actor for purposes of § 1983, noted that a private party can be characterized as a state actor when it is a willful participant in joint activity with the state or its agents. *Id*. at 422. The court then found that "the state effectively gave InnerChange its 24-hour power to incarcerate, treat, and discipline inmates. InnerChange teachers and counselors are authorized to issue inmate disciplinary reports, and progressive discipline is effectuated in concert with the DOC," thus, InnerChange and its affiliate were found to have acted jointly with the DOC so as to be classified as state actors. *Id*. at 423.[2]

These cases, when their facts are fully considered, reflect the type of "joint activities" that have been found to be sufficient for a private entity to be considered a state actor and, by comparison, show just how insignificant of a connection there was between Students United and the State. Clearly, SCSU's collection and payment of fees to a private entity cannot be enough to make that private entity a state actor subject to First Amendment restrictions. Something more must be required. If not, nearly every entity interacting with a university (or state entity), even on a limited basis, is at risk of being deemed a state actor.

If, for example, SCSU selected a private company to make athletic uniforms for the school, collected the cost for such uniforms from all student athletes, and then paid that money to the private company, under Plaintiff's analysis, that private company would

[2] Plaintiff also relies upon *Roberson v. Dakota Boys & Girls Ranch*, 42 F.4th 924, 930 (8th Cir. 2022), to support her "joint activity" argument; however, the court's decision in that case seemingly was based on the fact that that the state outsourced its constitutional obligation to provide adequate medical care to a child in its custody to a private entity. On that basis, the private entity was deemed a state actor. *Id*. at 932.

qualify as a state actor simply because SCSU was involved in collecting and paying money to the company. If the company then used some of its revenue to fund political activities or speech, Plaintiff seemingly would argue that the private company violated the student athlete's rights. But certainly, not every private individual or entity that interacts with or receives money from a state or government actor can be considered a state actor based on nothing more.[3]

Contrary to Plaintiff's argument, the cases discussed in Student United's Supporting Memorandum are not only more similarly factually, but they reflect that something more than funding is needed to make a private entity a state actor. Plaintiff's argument seems to be that because she claims to have met the "joint activity" test, it is unnecessary to consider the extent to which Students United was intertwined with SCSU or the state. According to Plaintiff, "what matters is that [Students United] was a 'willful participant in a joint activity with the State.'" P's Memo., pp. 20-21 (quoting *Lugar*, 457 U.S. at 941). Plaintiff looks to the private entities at issue in the cases discussed above but, unlike those entities, Students United was not engaged in any "joint activity" with SCSU. In *Lugar*, the oil company, court clerk, and sheriff acted jointly to attach the plaintiff's property. In *Meier*, the tow company acted jointly with the police to retain the plaintiff's truck. And in

[3] Plaintiff also seems to equate her situation to that of a state prisoner or juvenile placed into a facility against their will and suggests this supposed similarity somehow justifies a determination that Students United was a state actor. See P's Memo., pp. 17-18. There is, however, clearly a difference between those situations and Plaintiff, who was not forced or required to attend SCSU.

*Americans United*, the inmate program acted jointly with the prison to supervise and discipline inmates.

Students United did not act jointly with SCSU to do anything. It set a fee to be collected, and SCSU collected it, but Students United did not act jointly with SCSU in educating its students, nor did SCSU act jointly with Student's United in relation to the advocacy work it did on behalf of students. Students United and SCSU operate independently of one another, not jointly. SCSU is not involved in deciding what issues or positions Students United advocates, including because it has no role whatsoever in governing Students United, which operates by its own governing documents and student members. Students United is not even funded by SCSU or the state.

## II. Plaintiff Is Not Entitled To Damages, Including Under An Unjust Enrichment Theory.

Plaintiff argues that she has "stated an unjust enrichment claim," and, in fact, Students United does not dispute that Plaintiff has alleged the elements of such a claim. The question, however, is whether such claim is one "upon which relief may be granted." Minn. R. Civ. P. 12(b)(6). If there is no basis upon which Plaintiff may be entitled to relief based on the unjust enrichment claim, it follows that there is no basis or reason for allowing such claim to proceed. And, here, there is no such basis or support, including in the cases cited by Plaintiff.

First, as Plaintiff acknowledges, her unjust enrichment claim is dependent on her First Amendment claims. Accordingly, if she cannot maintain the First Amendment claims, including for the reasons argued, then she also cannot maintain the unjust enrichment

claim, as cases cited by Plaintiff recognize. *See Platt v. Brown*, 872 F.3d 848, 853 (7th Cir. 2017) ("if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim – and, of course, the unjust enrichment will stand or fall with the related claim"); *Lighthouse Mngt. Group, Inc. v. Deutsche Bank Trust Co. of Americas*, 380 F.Supp.3d 911, (D. Minn. 2019) (noting the plaintiff's unjust enrichment claim was inextricably intertwined with its quiet-title claim).

Second, even if Plaintiff's First Amendment claims are allowed to proceed, and it was determined that her First Amendment rights were violated, that does not mean Plaintiff will be entitled to reimbursement of the fees she paid to Students United. In the *Janus* cases, upon which Plaintiff so heavily relies, the Supreme Court held that compulsory fair-share fees paid by non-members to unions violated the non-members' First Amendment. *See Janus*, 942 F.3d at 354 (discussing *Janus v. AFSCME, Counsil 31*, 585 U.S. 878 (2018)). After that decision, Janus returned to the district court seeking a refund from the union for the fees it had paid. *Id*. at 354, 358. The district court, however, found that Janus was not entitled to a refund or any monetary damages, and the Seventh Circuit agreed. *Id*. at 359, 367.

The district court recognized that private defendants can in some circumstances act "under color of state law" for purposes of a claim brought under § 1983, and that such defendants are not entitled to immunity defenses available to public defendants, but the district court also noted that the Supreme Court had indicated private defendants may be entitled to an affirmative defense based on good faith or probable cause. *Id*. at 358 (citing

*Wyatt v. Cole*, 504 U.S. 158, 169 (1992)). Thus, the key question for the district court was "whether the defendant's reliance on an existing law was in good faith" and "[g]iven the fact that 'the statute on which defendant relied had been considered constitutional for 41 years,' it found good faith" and held Janus was not entitled to damage. *Id*. at 359.

The Seventh Circuit court proceeded to formally recognize that a private party that acts under color of law for purposes of § 1983 may defend on the ground that it proceeded in good faith. *Id*. at 364. It then found that AFSCME was entitled to such a defense, noting that until the Supreme Court said otherwise, "AFSCME had a legal right to receive and spend fair-share fees collected from nonmembers as long as it complied with state law [and the related case law]" and, therefore, "[i]t did not demonstrate bad faith when if followed these rules." *Id*. at 366. (also noting that "[t]he Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tealeaves predict that it might be in the future"). *See also Brown v. AFSCMC, Council No. 5*, 519 F.Supp.3d 512, 515 (D. Minn. 2021) (finding private actors who act in good faith have an affirmative defense to § 1983 liability); *Hoekman v. Education Minnesota*, 519 F.Supp.3d 497 (D. Minn. 2021) (same).

Turning to whether Janus was entitled to monetary damages, the Seventh Circuit noted that no one disputed Janus was entitled to declaratory and injunctive relief, such that he was protected from having to pay any further fees. *Janus*, 942 F.3d at 366. The appellate court, however, agreed that AFSCME's good faith defense precluded it from having to pay monetary damages. *Id*. at 366-67.

The court recognized Janus' contention that he did not want any of the benefits of AFSCME's activities, but he received them. Thus, "there was no unjust 'windfall' to the union." *Id*. at 367. That is, despite the Supreme Court's decision that his First Amendment rights were violated, including by having to subsidize certain speech through the fair-share fees, the court concluded that Janus "has received all that he is entitled to: declaratory and injunctive relieve, and a future free of any association with a public union." *Id*.

Here, Plaintiff seemingly is aware of the above decisions and, therefore, attempts to circumvent them by asserting an unjust enrichment claim instead. The district court and appellate court's reasoning, nevertheless, provides guidance when considering the unjust enrichment claim. That is, until this Court (or any appellate court) determines otherwise, Students United had a legal right to receive fees under the applicable statute, and while Plaintiff may not have wanted the benefits of being a member of Students United, she was entitled to them. Thus, there was no "unjust" windfall to Students United, nor was its receipt of fees unlawful at the time. As in *Janus*, Plaintiff may prevail on her First Amendment claims and, therefore, be entitled to declaratory relief, but she is not entitled to a refund of fees that were received by Students United in accordance with a statute, which Plaintiff does not even challenge the validity thereof.

Plaintiff, in fact, seemingly recognizes the possibility that Student United's receipt of fees may not have been unlawful and, therefore, she cites to cases for the general proposition that she may maintain an unjust enrichment claim against Students United even if it merely benefitted from the wrongdoing of another entity but did not engage in any wrongdoing itself. The cases that Plaintiff relies upon, however, are quite distinguishable.

In each of the cases cited by Plaintiff, the innocent defendant received money due to the fraudulent activities of another. *See e.g., Kranz v. Koenig*, 484 F.Supp.2d 997, 1001 (D. Minn. 2007) (finding it would be inequitable for a defendant to retain proceeds received from a sale of rental property that was based on fraud even though there was no allegation he participated in the fraudulent scheme); *Hartford Fire Ins. Co. v. Clark*, 727 F.Supp.2d 765, (D. Minn. 2010) (finding unjust enrichment claim could proceed against a transportation company that received payments as a result of a fraudulent billing scheme hatched by others); *Lighthouse Mngt. Group, Inc.*, 380 F.Supp.3d at (allowing unjust enrichment claim to proceed against an entity that received proceeds under a fraudulent real estate transaction). *See also Honeywell/Alliant Techsystems Fed. Credit Union v. Buckhalton*, 2000 WL 53875, at *3 (Minn. App. Jan. 25, 2000) (finding a plaintiff credit union was entitled to recover money from a defendant to whom a borrower fraudulently transferred money).

Here, the fees that Students United received were not the result of fraud. They were authorized by statute and Board Policy, and they were noted on SCSU's website and statements Plaintiff received. While Plaintiff disagrees with the requirement that she pay these fees, they were not paid or received as a result of fraud. There is obviously a difference between an entity, such as Students United receiving fees authorized by existing law, and an entity receiving money as a result of fraudulent conduct.

Lastly, Plaintiff notes that courts have also recognized that unjust enrichment claims have been allowed when the defendant's retention of the benefit or money would be morally wrong. Confusingly, Plaintiff then argues that Students United's argument fails

because "Students United does not contend that the complaint fails to allege that retention would be at least morally wrong." P's Memo., p. 27. The Complaint, in fact, does not allege that Students United's retention of fees would be morally wrong, only that it would be unjust. It is, however, not morally wrong for Students United to retain fees to which it was justly entitled by statute, which was not then (or now) declared to be invalid or to violate anyone's rights. Even if such determinations are made now, that may, at most, preclude fees from being collected or received in the future, but it would not provide a basis for an unjust enrichment claim.

Here, it must also be noted that because Plaintiff has "no serious chance of being awarded" damages, the declaratory judgment cases discussed in Students United's Supporting Memorandum are, in fact, applicable. See P's Memo., p.8.

## CONCLUSION

For the reasons set forth above, in Students United's Supporting Memorandum, and at oral argument, Plaintiff's claims should be dismissed. Plaintiff cannot establish that Students United was a state actor, including by showing it was engaged closely in any joint activity with SCSU or the State, nor can Plaintiff establish that she is entitled to any damages under her unjust enrichment theory.

Respectfully submitted,

**COUSINEAU MALONE, P.A.**

Dated: August 19, 2024

By: /s/ Tamara L. Novotny

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