

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

| | | |
|--------------------------------------|---|--------------------------------|
| Stephanie Sauby and James Burns, |) | Civ. No. 3:07-CV-0010 RSW-KKK |
| Individually, and on behalf of those |) | |
| similarly situated, |) | |
| |) | |
| |) | |
| Plaintiffs, |) | AMENDED STIPULATION FOR |
| |) | SETTLEMENT |
| v. |) | |
| |) | |
| City of Fargo, |) | |
| |) | |
| Defendant. |) | |

INTRODUCTION

This Stipulation for Settlement (the "Stipulation") is made and entered into by and among Stephanie Sauby and James Burns ("Plaintiffs"), individually and on behalf of all members of the class as certified by the Court, described below, except for those who opt out of class membership:

(1) The Sauby Subclass: All individuals who, between August 30, 2001 and July 19, 2006, incurred and paid fees (in whole or in part) to the City of Fargo and who did not receive a refund of the fees paid, for non-criminal traffic violations in excess of those allowed under N.D.C.C. § 39-06.1-06, but excluding from such class, the defendant, any and all officers, directors, employees, and agents of the defendant, their affiliates, and/or subsidiaries who are or have been employed by defendant; and/or

(2) The Burns Subclass: All individuals who, between July 20, 2006 and March 26, 2008, incurred and paid fees (in whole or in part) to the City of Fargo and who did not receive a refund of the fees paid, for non-criminal traffic violations in excess of those allowed under N.D.C.C. § 39-06.1-06, but excluding from such class, the defendant, any and all officers, directors, employees, and agents of the defendant, their affiliates, and/or subsidiaries who are or have been employed by defendant.

(the "Class Members"), and the City of Fargo (the "City"), by and through their duly authorized counsel in the above-captioned action (the "Action"). The Class Members and the City are hereinafter referred to collectively as the "Settling Parties."

BACKGROUND OF THE ACTION

1. In January 2007, Plaintiff Stephanie Sauby filed a class-action lawsuit against the City of Fargo pursuant to 42 U.S.C. § 1983 for violation of her constitutional rights. The original class-action Complaint asserted the City was unlawfully assessing fees for non-criminal traffic violations in excess of those allowed under section 39-06.1-06 of the North Dakota Century Code.

2. On May 1, 2007, the City filed a motion to dismiss, asserting Sauby's claims were barred by the Rooker-Feldman doctrine. This Court denied in part and deferred in part the City's motion and allowed Sauby's claims to go forward. The Court issued an order certifying the question of the legality of the City's traffic fee ordinance to the North Dakota Supreme Court.

3. The North Dakota Supreme Court ruled the City of Fargo did not have the authority to assess fees for non-criminal traffic violations in excess of those allowed under N.D.C.C. § 39-06.1-06. Sauby v. City of Fargo, 2008 ND 60, 747 N.W.2d 65.

4. On March 26, 2008, the City Commission of the City passed a resolution declaring a moratorium on the levying of fees for non-criminal traffic violations to the extent such fees exceed the limits for equivalent violation under the laws of the State of North Dakota.

5. On April 25, 2008, the Court issued an order denying the City's first Motion for Judgment on the Pleadings and adopting the North Dakota Supreme Court's opinion finding the City's traffic fee scheme to be illegal as the law of the case.

6. The City filed a second Motion for Judgment on the Pleadings on June 16, 2008. On August 13, 2008, the Court granted in part and denied in part the City's second Motion for Judgment on the Pleadings.

7. On October 27, 2008, Plaintiffs served the First Amended Class Action Complaint, adding James Burns as a named plaintiff and seeking injunctive relief in addition to compensatory damages. On December 22, 2008, pursuant to a stipulation between the parties, the Court issued an order certifying a litigation Class in this matter.

8. The parties engaged in discovery, including two depositions (a 30(b)(6) deposition of the City and deposition of North Dakota State Trooper Mitch Rumble). After two court-sponsored settlement conferences and months of negotiation, the Parties entered into the following stipulation to settle all claims in the case.

GENERAL PROVISIONS

9. Plaintiffs believe that the Action has substantial merit. Counsel for the Class Members, however, recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action against the City through trial and through appeal. Counsel for the Class Members have also taken into account the uncertain outcome, risk and delay inherent in any litigation, especially in complex actions such as this one, the strengths and weaknesses of the claims and defenses asserted in the Action, and the benefits conferred on the Class Members by the expeditious settlement set forth in this Stipulation. Counsel for the Class Members has determined that the settlement set forth in this Stipulation is in the best interests of the Plaintiffs and the Class Members.

10. The City believes Class Members are not entitled to compensatory relief and that the Action is without merit. The City has agreed to enter into this Settlement to reduce further litigation expense and inconvenience and to remove the distraction of burdensome and protracted litigation. This Stipulation shall not be construed or deemed to be evidence or an admission or concession by the City of any fault or liability for damages whatsoever. The City recognizes,

however, the expense and length of continued proceedings necessary to defend the Action through trial and through appeal, and the City acknowledges that it is desirable that the Action be settled in the manner and upon the terms and conditions set forth herein.

RELEASE

11. Upon this Court's entry of a Final Order and Judgment approving the Settlement, the Class Members in their individual and representative capacities, and for all of their respective heirs, executors and administrators, successors and assigns, shall release and forever discharge the City and its past, present and future officers, agents, employees, from any and all claims, actions, suits, obligations, demands, promises, liabilities, costs, expenses and attorneys' fees whatsoever (whether individual or class-wide in nature), whether based on any federal or state law or right of action, in law or in equity or otherwise, which the Class Members or any of them ever had, now have, or can have, or shall or may hereafter have, arising out of any acts, failures to act, omissions, representations, facts, events, transactions or occurrences set forth or alleged in the Action or in any way related, directly or indirectly, to the subject matter of the Action (the "Released Transactions"). The Settlement includes but is not limited to, a full resolution and discharge of claims for attorneys' fees, costs, prejudgment and post-judgment interest, of all Class Members who have not effectively opted out.

TERMS

12. Subject to the exceptions set forth below, and subject to Paragraph 13 below, the City shall pay to Verified Requesting Class Members, as defined in Subparagraph A below, no more than sixty-five (65) percent of the amount by which the actual sum they paid to the City as a fee from August 30, 2001 to March 24, 2008, as reflected on the City's records, exceeds the

highest fee that would have been authorized for the offense or offenses under the statutory state schedule (“the Excess Fee”).

A. A Class Member’s failure to opt out of the Class will not, by itself, entitle that Class Member to payment. Before the City is required to tender payment to a Class Member, the Class Member must have responded affirmatively to notification of the award in a manner that indicates their request for payment, and the City shall be permitted to require proof of identity and to verify the information submitted prior to any payment to such person, to ensure that the person who is requesting such payment is a member of the class. Such persons shall be described as “Verified Requesting Class Members.” The response required by this provision shall be described as a “Verification and Request for Payment.”

B. Verified Requesting Class Members will only qualify for payment under this Settlement if their Verification and Request for Payment is postmarked or received by the City by November 2, 2009.

C. Under no circumstances will the City be obligated under this Settlement to pay to Verified Requesting Class Members more than \$1.5 million, in total. If, on **November 16, 2009**, the total amount of valid Requests for Payment from Verified Requesting Class Members postmarked or received by the deadline set forth in Subparagraph B above, including the sums awarded by the Court pursuant to Paragraph 13 below, exceeds \$1.5 million, the percentage of the Excess Fees that the City is required by this Settlement to pay shall be reduced to a percentage below sixty-five (65) percent until the total amount owed to Verified Requesting Class Members no longer exceeds \$1.5 million.

D. Members of the Sauby subclass (class members who paid Excess Fees between August 30, 2001 and July 19, 2006) and members of the Burns subclass (class members who paid Excess Fees between July 20, 2006 and March 24, 2008) will be treated the same for purposes of this Settlement.

E. For purposes of this agreement, if an Excess Fee was tendered and received by the City, but thereafter the amount by which that fee exceeded the amount of the state schedule was refunded, that Excess Fee will not be considered one that was "paid."

13. Plaintiffs Sauby and Burns may request the District Court to award them a greater amount than they would be entitled to receive as Class Members pursuant to Paragraph 12 above as an incentive award. The City may assert its objection to any such request, and may challenge any aspect of the request, including the validity of any such payment, the amount of the requested payment, and whether the City should bear any portion of the impact of such an award.

Plaintiffs Sauby and Burns have no right under this Settlement to have the Court grant such a request. Whether such a request is granted in whole or in part shall be decided by the Court.

Whether any such request, if granted, should result in an increase in the amount paid by the City or should come from proceeds that would otherwise go to the other members of the class shall also be decided by the Court. If the Court approves an award pursuant to this paragraph but declines to find that it should be borne in its entirety by the City, the percentage of the Excess Fees that the City is required by this Settlement to pay shall be reduced (following the receipt of all timely Verification and Request for Payment forms) to a fraction of a percentage below 65 percent to the extent necessary to carry out the Court's finding.

14. The City Agrees to pay counsel for the class up to \$350,000 in reasonable attorney fees and costs as approved by the court, subject to the following conditions:

- A. Counsel for the class will not seek an award of fees and costs that exceed \$350,000.
- B. Under no circumstances shall the amount of such award or awards exceed \$350,000, individually or in total.
- C. The Court may exercise its discretion to award fees and costs that are less than \$350,000.
- D. The City agrees not to object to a fee request submitted in conformance with this Paragraph, but this Agreement shall not preclude the City from responding to any requests from the Court for information made as part of the Court's consideration of the fee request.
- E. The City's obligation to pay fees and costs as set by the Court is separate and independent of the City's obligation to pay up to \$1.5 million to Class Members as outlined above.
- F. Any request for such a fee shall be made in accordance with the procedures set forth in Fed. R. Civ. P. 54(d)(2) and Local Civil Rule 54.1(B).

ADMINISTRATION

15. The City is responsible for performing, at its expense, the tasks necessary to administer the Settlement, including notification of Class Members of the certification of the class and the proposed settlement, processing of opt-out requests and Verification and Request for Payment forms, and payments to Verified Requesting Class Members of sums owed pursuant to this Settlement.

16. The City shall have a duty to seek updated address information for Class Members only under the following circumstances:

1. After using the address in its database obtained at the time of the offense or the imposition of the fee to send the initial notice to a Class Member, the notice is returned to the City with notification of a forwarding address; or

2. After using the address in its database obtained at the time of the offense or the imposition of the fee to send the initial notice to a Class Member, the notice is returned to the City with an indication that the Class Members' address is unknown, and more recent address information is available to the City through use of the drivers' license number, social security number (if different) or the City's municipal court database. **The City also agrees to consult at least one on-line database including but not limited to www.switchboard.com or similar free internet based people search engine to determine a current address.**

17. The City shall pay any incentive awards to Sauby, Burns, or both, and attorneys' fees and costs awarded by the Court within 20 days of the final order and judgment becoming irrevocable as described in Paragraph 25 below. The City shall pay refunds owed to all Verified Requesting Class Members pursuant to this Settlement within 60 days of the final order and judgment becoming irrevocable as described in Paragraph 25 below.

18. If, after the Court awards class counsel their fees and costs pursuant to this Agreement, there are further proceedings, including but not limited to an appeal by one or more Class Members from one or more of the Court's rulings regarding this Settlement, the Class Members and the City shall bear their own fees and costs for such further proceedings. If, however, further proceedings are necessitated by the City's failure to fulfill its obligations under this Agreement and the Court finds the same, then, in that event, the Court shall award counsel for the class their reasonable fees and costs for such further proceedings.

19. Persons who opt out of the class will not be considered as "prevailing parties" for purposes of 42 U.S.C. § 1988, and have no rights under this Settlement.

20. The parties agree that they will negotiate a separate agreement or agreements, in good faith, concerning any exceptional circumstances which may arise concerning the administration of the settlement including, but not limited to the following: (1) Any Class Member who owes the City unpaid amounts for fees that have not been discharged by the City, whether because of a failure to pay in full the sum owed or a failure to abide by other terms

imposed by the court; (2) Class Members who requested and received a reduced fee on conditions imposed by the Court that were satisfied, such as work or detention; and (3) any other similar circumstance.

21. Promptly after the execution of this Stipulation, the Settling Parties shall jointly apply to the Court for an order (the "Preliminary Approval Order") substantially in the form annexed as Exhibit "A" hereto, for, and among other things, preliminary approval of the Settlement and Notice to the Class Members of the Settlement. The proposed Preliminary Approval Order to be presented to the Court shall specifically include provisions which, among other things:

- a. Preliminarily approve the Settlement;
- b. Approve forms of mailed notice substantially in the form of Exhibit "B-1" hereto, of a summary of notice to be published substantially in the form of Exhibit "B-2" hereto (the notice and summary collectively referred to as the "Notice"), and a Verification and Request for Payment and Request for Exclusion substantially in the form of Exhibits "C-1" and "C-2," collectively, hereto;
- c. Inform the Class Members of the Hearing (i) on final approval of the settlement and (ii) on counsel for the Class Members' application for attorneys' fees and costs;
- d. Direct the City to mail or cause to be mailed the Notice to all Class Members and that a summary of the Notice be published twice in the Fargo Forum;
- e. Direct counsel for the City to file with the Court proof, by affidavit, of the mailing of the Notice to all Class Members and publication of the summary of the Notice in the Fargo Forum;
- f. Provide that Class Members who wish to receive payment under this settlement shall file a Verification and Request for Payment form in accordance with the instructions contained therein; and
- g. Schedule the Hearing to be held by the Court to determine, among other things, whether the Settlement should be approved as fair, reasonable and adequate, whether an order approving the Settlement should be entered

thereon, and to award attorneys' fees and costs to Counsel for the Class Members.

22. The Notice shall include a full disclosure of the reasons for the Settlement including, but not limited to, (A) any payments made or to be made in connection with the Settlement, (B) the anticipated effect of the Settlement on the Class Members, (C) any agreement made in connection with the Settlement, (D) a description and evaluation of alternative considered by the representative parties, (E) an explanation of any other circumstances giving rise to the Settlement, and (F) a description of the procedure available for modification of the Settlement.

23. Each individual Notice shall be accompanied by a Verification and Request for Payment form for each Class Member. The Verification and Request for Payment form must be returned to the City or its designee as a condition precedent to a Class Member being entitled to receive payment.

24. Following Notice as provided herein, a hearing shall be held by the Court to consider final approval of this Stipulation and the Settlement as fair, reasonable and adequate ("Final Approval Hearing"). Upon approval by the Court of the Settlement contemplated by this Stipulation, a Final Order and Judgment substantially in the form of Exhibit "D" attached hereto shall be entered by the Court. The Final Order and Judgment shall (among other things):

- a. Find that the Settling Parties have submitted to the jurisdiction of the Court for purposes of the Settlement, that the Court has personal jurisdiction over the Settling Parties and that the Court has subject matter jurisdiction to approve the Stipulation, including all Exhibits thereto;
- b. Approve the Settlement as fair, reasonable and adequate, direct the Settling Parties and their counsel to comply with and consummate the terms of the Stipulation, and declare the Stipulation to be binding and preclusive in all pending and future lawsuits or other proceedings by all Class Members who have failed to opt out of the settlement;
- c. Find that the notice provided pursuant to the Stipulation complies in all aspects with the Federal Rules of Civil Procedure and: (i) constitutes reasonable and the best notice practicable; (ii) constitutes notice that is reasonably calculated, under the circumstances, to apprise Class Members

that the Action is pending, of the terms of the Settlement, and of their right to object to the Settlement and to appear at the Hearing; (iii) constitutes due, adequate and sufficient notice to all persons entitled to receive such notice; and (iv) meets the requirements of Due Process, any other applicable rules of the Court, and the Constitutions of the State of North Dakota and the United States of America;

- d. Find that Counsel for the Class Members have adequately represented the Class Members for purposes of entering into and implementing the Settlement;
- e. Dismiss this Action on the merits with prejudice, without fees or costs to any party except as provided in the Settlement and as approved by the Court; and
- f. Retain continuing and exclusive jurisdiction over all matters relating to administration, consummation, enforcement and interpretation of the Stipulation and the Final Order and Judgment, to protect and effectuate the Final Order and Judgment, and for any other necessary purpose.

25. The following conditions precedent to the Settlement are agreed to be material, such that the failure of any of these conditions shall render the entire Stipulation null and void:

- a. The Court shall enter the Preliminary Approval Order; and
- b. The Final Order and Judgment shall become irrevocable by being affirmed on appeal, through lapse of time for appeal without the filing of a notice of appeal, or because such Final Order and Judgment is no longer subject to any appeal.

26. This Stipulation and the Settlement provided for herein, whether or not consummated, and any proceedings taken under the Stipulation, are not and shall not, in any event, be construed or deemed to be evidence of an inference, a presumption, concession or an admission by the Settling Parties with respect to any issue of fact or law in this Action, the truth or falsity of any fact alleged or the validity or lack thereof of any claim which has been, ever could have been, or ever could be asserted in the Action, or any liability, faulty, wrongdoing or otherwise of the Defendants, or lack thereof.

27. The Settling Parties: (a) acknowledge that it is their intent to consummate this Stipulation; and (b) agree to cooperate to the extent necessary to effectuate and implement all

terms and conditions of this Stipulation and to act in good faith to accomplish the foregoing terms and conditions of the Stipulation.

28. All of the Exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

29. This Stipulation may not be modified or amended, nor may any of its provisions be waived except by a writing signed by all parties hereto or their successors-in-interest.

30. The administration and consummation of the Settlement as embodied in this Stipulation shall be under the authority of the Court and the Court shall retain jurisdiction for the purposes of enforcing the terms of this Stipulation.

31. The waiver by one party of any breach of this Stipulation by any other party shall not be deemed a waiver of any other prior or subsequent breach of this Stipulation.

32. All counsel or any other person executing this Stipulation and any of the Exhibits or any related settlement documents, warrant and represent that they have the full authority to do so and that they have the authority to take appropriate action required or permitted to be taken pursuant to this Stipulation to effectuate its terms.

33. This Stipulation, including the Exhibits hereto, was executed after arm's length negotiations between the Settling Parties.

34. This Stipulation shall not be construed more strictly against one party than another merely by virtue of the fact that it may have been prepared by counsel for one of the parties, it being recognized that, because of the arm's-length negotiations referred to above, all Settling Parties have contributed substantially and materially to the preparation of this Stipulation.

35. This Stipulation may be executed in one or more originals, photocopies or imaged counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

36. This Stipulation shall be binding upon, and inure to the benefit of, the successors, assigns, executors, administrators, heirs and legal representatives of the parties hereto, provided, however, that no assignment by any party hereto shall operate to relieve such party of its obligations hereunder.

37. All terms of this Stipulation shall be governed by the laws of the State of North Dakota, unless otherwise preempted by federal law.

38. This Agreement constitutes the entire agreement between the Settling Parties and supersedes and replaces all prior negotiations, agreements or understandings whether oral or written among the parties relating to the subject matter herein.

Dated: July 29, 2009.

/s/ Monte L. Rogneby (#05029)
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Dated: July 29, 2009.

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ATTORNEYS FOR DEFENDANT

INDEX OF EXHIBITS TO STIPULATION

| | |
|-------------------------|---|
| Exhibit Stipulation A | <i>Proposed Amended</i> Order of Preliminary Approval of Proposed Settlement |
| Exhibit Stipulation B-1 | <i>Proposed Amended</i> Notice of Proposed Class Action Settlement and Final Approval Hearing |
| Exhibit Stipulation B-2 | <i>Proposed Amended</i> Newspaper Notice of Proposed Class Action Settlement and Final Approval Hearing |
| Exhibit Stipulation C-1 | <i>Proposed Amended</i> Claim Form |
| Exhibit Stipulation C-2 | <i>Proposed Amended</i> Request for Exclusion |

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