



June 14, 2019

Hon. Judges Loken, Colloton, and Kelly  
8th Circuit Court of Appeals  
Thomas F. Eagleton Courthouse  
111 S. 10th St.  
St. Louis, MO 63102

Re: Incorrect Statement at oral argument in *Fleck v. Wetch*, No. 16-1564

Dear Judges Loken, Colloton, and Kelly:

During oral argument in the above-captioned matter on June 13, 2019, Counsel for Defendant/Appellees stated that the parties had stipulated or agreed that the State Bar of North Dakota (SBAND)'s bar dues form complies with constitutional standards and that Fleck had no objection to the form. That statement was incorrect.

Specifically, counsel stated:

*Counsel:* ...by the time Judge Hoveland entered his judgment in this case that was a completely resolved issue, we did that early in the case—

*The Court:* What was a resolved issue? The form?

*Counsel:* That we were *Keller*-complaint.

*The Court:* Even the “opt-in”/“opt-out”?

*Counsel:* Yes. Yes, exactly.....

*The Court:* I don't remember you saying, “Hey, they agreed that this form complied with the opt-out”—

*Counsel:* ...I did not say that. But that is what happened.

This is incorrect. The stipulation referred to—a copy of which is attached hereto—stated only that SBAND's revised *Keller* procedures resolved *Count One* of Fleck's complaint—i.e., the claim that SBAND's billing procedures did not “allow members to object to non-chargeable expenditures” as required by *Keller*. The stipulation did not resolve the other two causes of action, which are currently before this Court, regarding mandatory membership and the “opt-in”/“opt-out” issue.

On the contrary, Paragraph 12 of the stipulation expressly stated that the parties continued to dispute “the two claims which Plaintiff asserts remain outstanding: (1) violation of the alleged right to affirmatively consent to non-chargeable expenditures; and (2) the alleged unconstitutionality of a

mandatory bar association.” Paragraph 13 further stated that “*SBAND Defendants* assert there are no outstanding issues remaining,” but *at no time* did Fleck ever agree to this or concede that the revisions to SBAND’s *Keller* procedures resolved their concerns regarding either compulsory membership or the “opt out” mechanism inherent in SBAND’s billing procedure.

The parties’ stipulation therefore did not waive the “opt-out” issue but rather expressly preserved it for this Court’s review.

Respectfully submitted,

*/s/ Timothy Sandefur*

Timothy Sandefur  
Vice President of Litigation  
Scharf-Norton Center for Constitutional Litigation  
at the Goldwater Institute

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14th day of June, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Randall J. Bakke  
Shawn A. Grinolds  
Bradley N. Wiederholt  
300 West Century Avenue  
P.O. Box 4247  
Bismarck, ND 58502-4247  
rbakke@bgwattorneys.com  
sgrinolds@bgwattorneys.com  
bwiederholt@bgwattorneys.com

Douglas A. Bahr  
Solicitor General  
Office of Attorney General  
500 N. 9<sup>th</sup> St.  
Bismarck, ND 58501-4509  
dbahr@nd.gov

/s/ Timothy Sandefur  
Timothy Sandefur

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION

Arnold Fleck )  
)  
Plaintiff, )  
)  
v. )  
)  
Jack McDonald, President of the State Bar )  
Association of North Dakota; Aubrey )  
Fiebelkorn-Zuger, Secretary and Treasurer )  
of the State Bar Association of North )  
Dakota; Tony Weiler, Executive Director )  
of the State Bar Association of North )  
Dakota; and Penny Miller, Secretary- )  
Treasurer of the State Board of Law )  
Examiners, in their official capacities, )  
)  
Defendants. )

Civil No. 1:15-CV-00013

**JOINT STIPULATION OF  
PARTIAL CASE RESOLUTION AND  
BRIEFING SCHEDULE REGARDING  
DISPOSITIVE MOTIONS**

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COMES NOW Plaintiff, Arnold Fleck, and Defendants Jack McDonald, Aubrey Fiebelkorn-Zuger, Tony Weiler (collectively “SBAND Defendants”), and Penny Miller, who stipulate as follows:

1. On February 3, 2015, Plaintiff filed a Complaint for Declaratory and Injunctive Relief, alleging three claims for relief against Defendants: (1) lack of minimum safeguards required under Keller v. State Bar of California, 496 U.S. 1 (1990); (2) violation of the right to affirmatively consent to non-chargeable expenditures; and (3) the unconstitutionality of a mandatory bar association. Doc. 1.
2. On February 3, 2015, Plaintiff filed a Motion for Preliminary Injunction with respect to his first and second claims for relief.
3. On May 14, 2015, this Court ordered the parties to conduct settlement discussions

under the supervision of a Magistrate Judge.

4. On May 27, 2015, the parties conducted settlement discussions as ordered and agreed to negotiate a resolution of the case. All deadlines in the case were stayed.

5. Between August 7 and September 18, 2015, the parties exchanged documents in an attempt to resolve the dispute.

6. On September 24, 2015, SBAND Defendants submitted final drafts of the revised policies of the State Bar Association of North Dakota to Plaintiff. A copy of the revised policies is incorporated herein as Exhibits 1-3.

7. SBAND Defendants agree to adopt the revised policies reflected in Exhibits 1-3 and to adhere to them until such time as the policies may hereinafter be revised further by the SBAND, consistent with applicable law.

8. Accordingly, Plaintiff and SBAND Defendants agree that adoption of and adherence to the revised policies reflected in this stipulation will resolve fully and completely the first claim for relief requested in Plaintiff's Complaint, see Doc. 1 ¶¶ 71-76.

9. In light of SBAND Defendants' agreement in ¶ 7, above, Plaintiff hereby withdraws his Motion for Preliminary Injunction.

10. Although Plaintiff agrees that the policies embodied in Exhibits 1-3 resolve his first claim, Plaintiff asserts that he lacks sufficient knowledge to endorse or dispute the accounting set forth in Exhibit 2 (Notice Concerning State Bar Dues Reduction and Mediation Process) or to state that it accurately reflects all non-chargeable expenditures made by SBAND. Plaintiff however agrees he does not intend to challenge and/or dispute the accounting set forth in Exhibit 2.

11. Plaintiff and SBAND have resolved plaintiff's claim for attorneys' fees and costs

in this case and agree that plaintiff's request for attorneys' fees and costs has been fully and finally resolved, including any future attorneys' fees and costs to be incurred by the plaintiff.

12. Plaintiff and SBAND Defendants have conferred and agreed on a proposed schedule for dispositive motions in this case with respect to the two claims which Plaintiff asserts remain outstanding: (1) violation of the alleged right to affirmatively consent to non-chargeable expenditures; and (2) the alleged unconstitutionality of a mandatory bar association.

13. SBAND Defendants assert there are no outstanding issues remaining, as the above issues asserted by Plaintiff are already disposed of in Defendants' favor based on existing law.

14. SBAND Defendants also claim Plaintiff has asserted constitutionality of North Dakota law claims against the wrong party or parties.

15. Defendant Miller asserts that she is not the proper party to address the issues identified in paragraph 12 or to defend the constitutionality of North Dakota law.

16. Plaintiff's motion for summary judgment shall be due on or before **November 20, 2015**.

17. Defendants' cross-motion for summary judgment and opposition to Plaintiff's motion for summary judgment (including any opposition under Federal Rule of Civil Procedure 56(d)) shall be due on or before **December 23, 2015**.

18. Plaintiff's reply in support of their motion for summary judgment and opposition to SBAND Defendants' cross-motion for summary judgment (including any opposition under Federal Rule of Civil Procedure 56(d)) shall be due 45 days after the filing of Defendants' cross-motion for summary judgment.

19. Defendants' reply in support of their cross-motion for summary judgment shall be due 30 days after the filing of Plaintiff's reply in support of his motion for summary judgment

and opposition to Defendants' cross-motion for summary judgment.

20. The parties respectfully request that the Court adopt this stipulation and proposed schedule.

Dated this 20<sup>th</sup> day of November, 2015.

SCHARF-NORTON CENTER FOR CONSTITUTIONAL  
LITIGATION AT THE GOLDWATER INSTITUTE

By: /s/ Jared Blanchard

Jared Blanchard (Ariz. Bar #: 031198)  
James Manley (Ariz Bar #: 031820)  
500 E. Coronado Road  
Phoenix, AZ 85004  
Ph: 602-462-5000; Fax: 602-256-7045  
[litigation@goldwaterinstitute.org](mailto:litigation@goldwaterinstitute.org)

Attorneys for Plaintiff, Arnold Fleck

Dated this 20<sup>th</sup> day of November, 2015.

SMITH BAKKE PORSBORG  
SCHWEIGERT & ARMSTRONG

By: /s/ Randall J. Bakke

Randall J. Bakke (#03898)  
Bradley N. Wiederholt (#06354)  
122 East Broadway Avenue  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
[rbakke@smithbakke.com](mailto:rbakke@smithbakke.com)  
[bwiederholt@smithbakke.com](mailto:bwiederholt@smithbakke.com)

Attorneys for Defendants,  
Jack McDonald, Aubrey Fiebelkorn-Zuger,  
and Tony Weiler

Dated this 20<sup>th</sup> day of November, 2015.

STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERAL

By: /s/ Douglas A. Bahr

Douglas A. Bahr  
Solicitor General  
State Bar ID No. 04940  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 329-4300  
[dbahr@nd.gov](mailto:dbahr@nd.gov)

Attorney for Defendant,  
Penny Miller



**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2015, a true and correct copy of the foregoing **JOINT STIPULATION OF PARTIAL CASE RESOLUTION AND BRIEFING SCHEDULE REGARDING DISPOSITIVE MOTIONS** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

Jared H. Blanchard  
James Manley  
The Goldwater Institute  
500 East Coronado Road  
Phoenix, AZ 85004  
[jblanchard@goldwaterinstitute.org](mailto:jblanchard@goldwaterinstitute.org)  
[jmanley@goldwaterinstitute.org](mailto:jmanley@goldwaterinstitute.org)

Douglas A. Bahr (#04940)  
Solicitor General  
Office of Attorney General  
500 N. 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
[dbahr@nd.gov](mailto:dbahr@nd.gov)

By: /s/ Randall J. Bakke  
RANDALL J. BAKKE

Joint Stipulation of Partial Settlement