

**United States Court of Appeals
For the Eighth Circuit**

No. 16-1564

Arnold Fleck
Plaintiff-Appellant

v.

Joe Wetch, President of the State Bar Association
of North Dakota, et al.

Defendants-Appellees

Appeal from United States District Court
for the District of North Dakota-Bismarck

Submitted: April 4, 2017
Filed: August 17, 2017

Before LOKEN, COLLOTON, and KELLY, Circuit
Judges.

LOKEN, Circuit Judge.

In 2014, North Dakota attorney Arnold Fleck volunteered time and money to support Measure 6, a state ballot measure to establish a presumption that each parent is entitled to equal parental rights. North Dakota has an integrated bar, meaning that Fleck and

other licensed attorneys must maintain membership in and pay annual dues to the State Bar Association of North Dakota (“SBAND”) as a condition of practicing law.¹ When Fleck learned that SBAND was using his compulsory fees to oppose Measure 6, he filed a lawsuit seeking declaratory and injunctive relief, asserting three First Amendment claims. First, he alleged that SBAND’s procedures for allowing members to object to non-germane expenditures failed to comply with the minimum safeguards required by *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). This claim was resolved by a November 2015 settlement in which SBAND revised its license fees statement. Second, Fleck alleged that an integrated bar violates his freedoms not to associate and to avoid subsidizing speech with which he disagrees. The district court dismissed this claim as barred by *Keller*. Fleck concedes we are bound by *Keller*, so we need not further address this issue. Third, he alleged that SBAND’s “opt-out” procedure violates his right to affirmatively consent before subsidizing non-germane expenditures. The district court² granted summary judgment dismissing this claim, the subject of Fleck’s appeal. Reviewing this ruling *de novo*, we affirm.

1. The First Amendment Landscape. In *International Association of Machinists v. Street*, 367 U.S.

¹ North Dakota’s integrated bar is codified in N.D.C.C. §§ 27-11-22, 27-12-02.

² The Honorable Daniel L. Hovland, Chief Judge of the United States District Court for the District of North Dakota.

740, 774 (1961), a divided Supreme Court upheld the validity of a Railway Labor Act provision authorizing “union shop” collective bargaining agreements that require railroad employees to pay union dues, fees, and assessments as a condition of continued employment. Four Justices upheld the statute by construing it as “denying the unions the right, over the employee’s objection, to use his money to support political causes which he opposes,” *id.* at 768 (opinion of Brennan, J., for the Court); a fifth Justice agreed to this remedy “dubitante,” *id.* at 779 (Douglas, J., concurring). That same day, a divided Court held that a State may constitutionally condition practicing law on membership in an integrated bar association. There was no majority opinion, and Justice Brennan’s four-Justice plurality did not address whether an integrated bar association may use a member’s compulsory fees to support political activities that he or she opposes. *See Lathrop v. Donohue*, 367 U.S. 820, 843-844 (1961).

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), applying *Street* and First Amendment principles, the Court held that public sector unions may collect compulsory “agency fees” from non-members within the bargaining unit to fund activities germane to collective bargaining, but may not use those fees to fund non-germane political or ideological activities that a non-member employee opposes. In *Hudson*, the Court held that the procedure a union adopts to implement this distinction must “be carefully tailored to minimize the infringement” of a non-member’s First Amendment rights. 475 U.S. at 303. The procedure at

issue in *Hudson* did not meet this standard “because it failed to minimize the risk that non-union employees’ contributions might be used for impermissible purposes . . . failed to provide adequate justification for the advance reduction of dues, and . . . failed to offer a reasonably prompt decision by an impartial decisionmaker.” *Id.* at 309. Constitutional requirements include, the Court declared, “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” *Id.* at 310.

The Supreme Court returned to the issue of integrated bar compulsory fees in *Keller*, concluding that an integrated bar can, consistent with the First Amendment, use a member’s compulsory fees to fund activities germane to “regulating the legal profession and improving the quality of legal services,” but not to fund non-germane activities the member opposes. 496 U.S. at 13-14. Lacking an adequate record to address procedural alternatives in detail, the Court stated that “an integrated bar could certainly meet its *Aboud* obligation by adopting the sort of procedures described in *Hudson*.” *Id.* at 17.

2. SBAND’s Post-Settlement Procedures. SBAND concedes that its expenditures in support of Measure 6 were “non-germane” under *Keller*, so the issue in this case is whether SBAND has implemented constitutionally adequate procedures to protect the First Amendment rights of North Dakota attorneys

who oppose a non-germane expenditure. When Fleck filed this action, SBAND's Legislative Policy provided that a member who dissented from a position on any legislative or ballot measure matter could receive a refund of that portion of his or her dues which would otherwise have been used in that activity. The Policy did not advise if members could opt out of paying for non-germane expenses in advance, inform members of the breakdown between germane and non-germane expenses, or allow members to challenge SBAND's calculation of germane expenses before an impartial decisionmaker. In response to this lawsuit, SBAND adopted revised policies that Fleck agreed comply with the minimum safeguards required by *Keller* and *Hudson*, and the district court dismissed Fleck's first claim without prejudice. Accordingly, it is the revised policies that are relevant to Fleck's appeal of the "opt-out" issue.

Each year, SBAND sends a Statement of License Fees Due. Unless exempt, a member must pay annual dues of either \$380, \$350, or \$325, depending on years of practice. The Statement lists this figure as the "annual license fee." The member certifies that he or she has complied with rules governing trust accounts and malpractice insurance, and checks boxes to enroll in specialized SBAND sections for additional fees, contribute to the bar foundation, and donate to a pro bono fund. The following new section appears near the end of the revised Statement:

OPTIONAL: Keller deduction relating to nonchargeable activities. Members wanting to

take this deduction may deduct \$10.07 if paying \$380; \$8.99 if paying \$350; and \$7.90 if paying \$325. (See Insert.)

SBAND computes this deduction as a percentage of annual license fees based on the percentage of the prior year's fees that SBAND spent on non-germane activities. Next to this explanation is a blank allowing the member to write in an amount to be deducted from the license fees due. At the end of the Statement, the member adds optional fees selected to the annual license fee and subtracts the "Keller deduction" if chosen. The resulting figure is the amount due. Members return the completed Statement with a check payable to the State Board of Bar Examiners ("Board"), which collects license fees and issues annual licenses. *See* N.D.C.C. § 27-11-22.³

An Insert with the new Statement is a Notice Concerning State Bar Dues Deduction and Mediation Process. This two-page document describes the holding in *Keller*, explains how SBAND calculates nonchargeable activities each year, and informs members how to object to SBAND determinations. In addition, a new Keller Policy available on SBAND's member website provides an additional notice:

SBAND shall provide periodic notice to its membership of any expenditures that deviate from its pre-collection notice. SBAND shall

³ SBAND receives \$75 of each annual license fee for operation of the lawyer discipline system and 80% of the remaining fee totals "for the purpose of administering and operating the association." § 27-12-04.

also provide notice of any position it adopts regarding legislative proposals and initiated and referred measures within two weeks of SBAND's vote to adopt such positions. After being emailed to members of SBAND, such notices will be readily accessible at www.sband.org.

3. *The Opt-Out Issue.* Relying on the Supreme Court's recent decision in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), Fleck argues that the revised license fees Statement violates the First Amendment because it requires him to opt out of subsidizing non-germane expenses, and SBAND may only finance non-germane activities with compulsory fees paid by affirmatively consenting members. The district court concluded that *Knox* did not overrule prior cases holding that the First Amendment does not require an opt-in procedure.

Railway Labor Act agency shop collective bargaining agreements at issue in *Street* and in *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), provided a "checkoff" procedure whereby the railroad employer sent union members' mandatory dues directly to the union and deducted the dues from the employees' paychecks. If members successfully objected to paying dues for union expenditures for political causes, the union would place them on "agency fee payer status." See generally *Conrad v. Int'l Ass'n of Machinists*, 338 F.3d 908, 910-11 (8th Cir. 2003). Likewise, in *Hudson*, the Chicago School Board agreed to deduct "proportionate share payments" from the paychecks of

non-member teachers and send them directly to the Teachers Union; after the deduction, if the Union sustained a non-member's objection, future deductions of all non-members were reduced and the objector received a rebate. 475 U.S. at 295.

In *Knox*, a public-sector union provided an annual *Hudson* notice calculating germane expenses and permitting non-members to opt out of non-germane expenses by objecting within thirty days. 567 U.S. at 303. Thirty days later, the union imposed a one-time dues increase to fund its political opposition to controversial ballot measures and to re-electing the incumbent governor. *Id.* at 304-05. The union sent no new *Hudson* notice, applied a portion of the dues increase to non-members who already had opted out, and did not allow non-members who did not initially opt out to opt out of paying the special assessment. *Id.* at 305-06. The Court struck down this procedure, concluding that, “[t]o respect the limits of the First Amendment, the union should have sent out a new notice allowing non-members to opt in to the special fee rather than requiring them to opt out.” *Id.* at 317.

In the majority opinion, five Justices more broadly criticized the opt-out procedure approved in its prior decisions:

Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport

with the probable preferences of most non-members? . . . An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.

Id. at 312. The Court explained that its tolerance of annual opt-out procedures came about “more as a historical accident than through the careful application of First Amendment principles.” *Id.* The majority stated that these “prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.” *Id.* at 314. It invalidated the special assessment at issue because, even if the opt-out burden “can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires.” *Id.* at 317. Two Justices agreed that the special assessment in *Knox* failed to follow procedures mandated by *Hudson* but disagreed with the majority’s broad condemnation of opt-out procedures upheld in *Hudson* and *Abood*. *Id.* at 323 (Sotomayor, J., concurring in the judgment).

We agree with the district court that the decision in *Knox* left in place annual procedures established in *Hudson*, and cross-referenced in *Keller*, which included an opt-out feature. But this does not wholly answer the issue on this appeal, because *Hudson* requires procedures “carefully tailored to minimize the infringement” of a non-member’s First Amendment rights, 475 U.S. at 303, which is a fact-intensive standard, as the Court

acknowledged in *Keller*, 496 U.S. at 17. In our view, focusing on the revised SBAND procedures, there is an obvious answer to Fleck’s challenge, namely, that the opt-out issue debated by the Court in *Knox* is simply not implicated by SBAND’s revised license fee Statement.

In a Railway Labor Act or public sector union case involving a collectively bargained dues checkoff procedure, the employer transfers money the employee has earned directly to the union, unless the protesting employee affirmatively “opts out.” The union then gets to use this compulsory payment on non-germane expenditures the employee opposes, at least until the employee successfully objects and obtains a rebate. Here, on the other hand, North Dakota attorneys pay the annual license fee themselves. Fleck admits the revised license fee Statement adequately discloses a member’s option not to fund non-germane expenditures, the issue resolved by the settlement and dismissal of his first claim. Before submitting an annual license fee payment, each member calculates the amount owing on the revised Statement. If he selects the Keller deduction, he writes a check for the lower amount that excludes a payment for SBAND’s non-germane expenditures. If he does not choose the Keller deduction, he “opts in” to subsidizing non-germane expenses by the affirmative act of writing a check for the greater amount. Thus, the opt-out issue debated but not decided in *Knox* is irrelevant to whether SBAND’s

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revised license fee procedures comply with the mandates of *Keller* and *Hudson*.

The judgment of the district court is affirmed.

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

Arnold Fleck,	)	ORDER OF DIS-
Plaintiff,	)	MISSAL OF CLAIM
	)	ONE; ORDER
Jack McDonald, President	)	FINDING AS MOOT
of the State Bar Association	)	MOTION FOR
of North Dakota; Aubrey	)	PRELIMINARY
Fiebelkorn-Zuger, Secretary	)	INJUNCTION
and Treasurer of the State	)	(Filed Nov. 24, 2015)
Bar Association of North	)	Case No: 1:15-cv-136
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.)	

Before the Court is a “Joint Stipulation of Partial Case Resolution,” filed on November 20, 2015. *See* Docket No. 42. The Court **ADOPTS** the stipulation, as it relates to the Plaintiff’s substantive claims, in its entirety (Docket No. 42) and **ORDERS** that the Plaintiff’s first claim regarding a lack of minimum safeguards required under *Keller v. State Bar of California*, 496 U.S. 1 (1990), be dismissed pursuant to Rule 41(a)(1)(a)(ii) of the Federal Rules of Civil Procedure, without prejudice and without costs or disbursements

to either party. Accordingly, the Plaintiff's "Motion for Preliminary Injunction" (Docket No. 3) is **DENIED** as **MOOT**.

IT IS SO ORDERED.

Dated this 24th day of November, 2015.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Arnold Fleck,)	
Plaintiff,)	
vs.)	
Joe Wetch, President of	)	Case No. 1:15-CV-13
the State Bar Association)	
of North Dakota; Aubrey	)	ORDER GRANTING
Fiebelkorn-Zuger, Secretary	)	DEFENDANTS'
and Treasurer of the State	)	CROSS-MOTION FOR
Bar Association of North	)	SUMMARY JUDGMENT;
Dakota; Tony Weiler,	)	ORDER DENYING
Executive Director of the	)	PLAINTIFFS MOTION
State Bar Association of	)	FOR SUMMARY
North Dakota and Penny	)	JUDGMENT
Miller, Secretary-Treasurer	)	(Filed Jan. 28, 2016)
of the State Board of)	
Law Examiners, in their)	
official capacities,)	
Defendants.)	

The Plaintiff, Arnold Fleck, is an attorney and member of the integrated State Bar Association of North Dakota (“SBAND”). The Defendants are Joe Wetch, President of the State Bar Association of North Dakota; Aubrey Fiebelkorn-Zuger, Secretary and Treasurer of the State Bar Association of North Dakota; and Tony Weiler, Executive Director of the State Bar Association of North Dakota (“SBAND Defendants”). All parties agree there are no genuine issues of material fact in dispute. The parties request the Court, through

their pending cross-motions for summary judgment, rule upon the following issues as a matter of law:

- (1) Whether the Plaintiff may constitutionally be required to be a member of, and pay dues to, SBAND in order to practice law in North Dakota; and
- (2) Whether SBAND's procedures, which permit the Plaintiff to "opt-out" of funding activities which are not germane to the compelling interests of regulating attorneys and improving the quality of legal services available to the citizens of North Dakota, provide the Plaintiff with minimum constitutionally required safeguards.

I. BACKGROUND

SBAND is a professional association of members of the legal profession licensed to practice law in the State of North Dakota and attorneys who, by virtue of holding judicial or other office, are exempt from such licensing. N.D.C.C. § 27-12-02. SBAND was created by statute, and is governed by a Board of Governors elected from its membership. SBAND is an integrated bar association meaning membership and payment of dues are mandatory in order to practice law in the State of North Dakota. The objectives of SBAND are to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar. *See* Docket No. 26-1.

SBAND sets annual bar dues for its members. By statute, \$75 of each annual license is paid to SBAND to fund the lawyer discipline system, with 80% of the remainder of each annual license being paid to SBAND “for the purpose of administering and operating the association.” N.D.C.C. § 27-12-04. In part, SBAND investigates complaints against attorneys and facilitates attorney discipline, promotes law-related education and ethics, facilitates and administers a volunteer lawyers program and lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects, monitors and keeps members of the bar updated on the status of various legislative measures, and provides information to the legislature on matters affecting regulation of the legal profession and matters affecting the quality of legal services available to the people of the State of North Dakota. *See* Docket No. 50, p. 2.

SBAND also engages in certain “non-chargeable” activities, that is, all activities other than those related to its compelling government interest in improving the practice of law through the regulation of attorneys. *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986); *See* Docket No. 42-2. Some portion of the dues are spent on political or ideological activities, and SBAND is constitutionally compelled to reimburse that spending to bar members who so request. SBAND conducts a variety of activities that include

lobbying on bills pending before the Legislative Assembly of North Dakota. *See* Docket No. 25, pp. 3-4.

In this case, SBAND expended member dues on certain challenged “non-chargeable” activities, namely opposing North Dakota Initiated Statutory Measure No. 6 (“Measure 6”). *See* Docket No. 42-2, p. 3. Fleck strongly supported Measure 6, which appeared on the North Dakota ballot on November 4, 2014. Measure 6 proposed to “amend section 14-09-06.2 of the North Dakota Century Code to create a presumption that each parent is a fit parent and entitled to be awarded equal parental rights and responsibilities by a court unless there is clear and convincing evidence to the contrary.” Fleck contributed \$1,000 to a committee in support of Measure 6, and he also he [sic] participated in the campaign – appearing on television and radio to debate the merits of the measure. *See* Docket No. 4-1, p. 2.

The record reveals that a few weeks before the election Fleck discovered – through a third party – that SBAND staunchly opposed Measure 6 and threw its weight behind the opposition, expending member dues in the process. *See* Docket No. 4-1, p. 3. SBAND contributed \$50,000 in compelled member dues to “Keeping Kids First,” a committee that opposed Measure 6. *See* Docket Nos. 4-2 and 42-2. Ultimately, the “Keeping Kids First” committee returned some of these funds, and SBAND’s final contribution totaled \$46,525.85. *See* Docket No. 20, p. 8. In addition, SBAND provided “Keeping Kids First” with support by allowing the ballot committee to utilize SBAND’s email system and establish an email address with SBAND’s domain name:

keepingkidsfirst@sband.org. See Docket No. 1, p. 9; Docket No. 20, p. 9.

On February 3, 2015, Arnold Fleck filed a complaint in federal court for declaratory and injunctive relief, alleging three claims for relief against the 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. See Docket No. 1. On February 3, 2015, Fleck filed a “Motion for Preliminary Injunction” with respect to his first and second claims for relief. See Docket No. 3. On May 14, 2015, the Court ordered the parties into an early settlement conference under the supervision of Magistrate Judge Charles Miller. On May 27, 2015, the parties became involved in settlement discussions as ordered and agreed to negotiate a resolution of the case. All deadlines in the case were then stayed.

Pursuant to a “Joint Stipulation of Partial Case Resolution and Briefing Schedule Regarding Dispositive Motions,” dated and filed November 20, 2015 (Docket No. 42), the parties agreed SBAND would adopt revised policies (Docket Nos. 42-1 through 42-3); that such adoption would fully and completely resolve the Plaintiff’s first claim for relief described above; that the Plaintiff would withdraw his “Motion for Preliminary Injunction,” and the parties agreed to settle all of the Plaintiff’s claims for the recovery of past, present, and future attorney fees and costs in this case. A briefing schedule was agreed upon relative to the

pending cross-motions for summary judgment as to the Plaintiff's second and third claims. Thereafter, this Court adopted the Joint Stipulation and dismissed the Plaintiff's first claim for relief pursuant to the "Order of Dismissal of Claim One; Order Finding as Moot Motion for Preliminary Injunction" filed on November 24, 2015, (Docket No. 46).

SBAND's new procedures¹ now provide members with the ability to "opt-out" of payment of their pro-rata share of "non-chargeable" expenditures estimated for the upcoming fiscal year, and based on the prior years audited financial statements. Fleck concedes SBAND's newly adopted procedures are in compliance with the minimum safeguards established under *Keller* and *Hudson*, and that such new procedures resolve the first claim for relief in this case. With respect to the remaining two counts, Fleck asserts Supreme Court precedent is no longer viable and should be overturned as such precedence is allegedly irreconcilable with the United States Supreme Court's subsequent decision in *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012). Specifically, Fleck asserts the "opt-out" procedure is not adequate to protect his First Amendment rights, and instead asserts that bar members must be allowed to "opt-in" in order to fund "non-chargeable" expenditures.

¹ SBAND Board of Governors adopted the revised policies on September 18, 2015. (Second Weiler Aff. At ¶ 5 and Exhibit Y.) The new "Keller Policy" is posted on the SBAND website.

II. STANDARD OF REVIEW

It is well-established in the Eighth Circuit that summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and, therefore, the moving party is entitled to judgment as a matter of law. *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 654 (8th Cir. 2007); *See* Fed. R. Civ. P. 56(c). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.*

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 832 (8th Cir. 2005). The moving party first has the burden of demonstrating an absence of genuine issues of material fact. *Simpson v. Des Moines Water Works*, 425 F.3d 538, 541 (8th Cir. 2005). The non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

In the present case, the record reveals that all parties agree there are no genuine issues of material fact

in dispute, and the remaining legal claims are issues for this Court to resolve.

III. LEGAL DISCUSSION

A. CONSTITUTIONALITY OF NORTH DAKOTA'S INTEGRATED BAR AND COMPULSORY DUES

The Plaintiff, Arnold Fleck, concedes his “claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by” the United States Supreme Court decisions in *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990) and *Lathrop v. Donohue*, 367 U.S. 820 (1961). The Supreme Court in *Lathrop* upheld Wisconsin’s integrated state bar on the basis that (1) the only “compelled association” was the payment of dues, which was insufficient on its own to comprise a constitutional violation, and (2) the purpose of integrating the bar was to “promote high standards of practice and the economical and speedy enforcement of legal rights.” 367 U.S. at 827-28. The Supreme Court in *Keller* reaffirmed this point decades later. *Keller* clearly clarified that “lawyers admitted to practice in the State may be required to join and pay dues to the State Bar.” 496 U.S. at 4. There is no question under *Keller* and *Lathrop* that integrated bar associations are justified by a state’s interest “in regulating the legal profession and improving the quality of legal services.” 496 U.S. at 13. Thus, the State of North Dakota may constitutionally condition the right

of its attorneys to practice law upon the payment of membership dues to an integrated bar.

Although Fleck has conceded his third claim for relief is foreclosed by Supreme Court precedent, he asserts this long-standing precedent should be overturned by the Supreme Court on a future appeal on the basis that *Keller* and *Lathrop* are irreconcilable with basic First Amendment principles and subsequent decisions and, in particular, the United States Supreme Court decision in *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012). As Fleck has conceded his legal arguments are contrary to United States Supreme Court precedent directly on point, the Court will grant summary judgment in favor of the Defendants on the third claim for relief.

B. SBAND'S OPT-OUT PROCEDURE IS CONSTITUTIONAL

For the same reason Fleck's challenge to the constitutionality of SBAND's integrated bar is foreclosed by United States Supreme Court precedent, the challenge to SBAND's "opt-out" procedure is also foreclosed by similar precedent. The United States Supreme Court specifically stated in the context of an integrated bar in *Keller* that the "opt-out" procedures established under *Chicago Teachers Union, Local No. 1, v. Hudson*, 475 U.S. 272 (1986) satisfied constitutional requirements. *See Keller*, 496 U.S. at 16 ("We believe an integrated

bar could certainly meet its *Abood* obligation² by adopting the sort of procedures described in *Hudson*.” (Footnote added)).

As a result of this lawsuit, SBAND has now established a new procedure called the “Keller Policy” by which members choose whether to allow their bar dues to be used for “non-chargeable” activities, i.e., political or ideological activities. *See* Docket No. 42-3. The new procedures employed by SBAND are based on the policies and procedures for labor unions that the Supreme Court approved in *Hudson*. In *Hudson*, the Supreme Court required a labor union’s agency fees to include “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. *Id.* at 310.

SBAND provides its members with annual notice of the fee, a description of how it is calculated, and the ability to receive a deduction for the portion of the dues

² In *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) the United States Supreme Court concluded although the Constitution of the United States of America did not prohibit a union from spending funds for the expression of political views, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representatives, the Constitution did require that such expenditures be financed from charges, dues, or assessments paid by employees who did not object to advancing those ideas and who were not coerced into doing so against their will by the threat of loss of governmental employment. *Id.* at 234-36.

used for “non-chargeable” purposes. A neutral mediator (Karen Klein or her designee) hears timely challenges to that amount. The new procedures are as follows:

SBAND KELLER POLICY

1. The State Bar Association of North Dakota (“SBAND”) may engage in and fund any activity that is reasonably intended for the purposes of the association which are set forth in Article 2 of the Constitution of SBAND, permitted by the by-laws of SBAND, or as otherwise statutorily authorized. SBAND may not use the compulsory dues of any member who objects pursuant to paragraph 3 of this policy for activities that are not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Expenditures that are not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990) may be funded only with user fees or other sources of revenue, or those portions of member compulsory dues for which no objection has been made pursuant to paragraph 3 unless any such objection has been determined against the objecting member by a neutral mediator.

2. Prior to the beginning of each fiscal year, SBAND shall publish written notice of the activities that can be supported by compulsory dues (“Chargeable”) and the activities that cannot be supported by compulsory dues (“nonchargeable”). The notice shall estimate

the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues without such member's consent. The notice shall be sent to every member of SBAND together with the annual dues statement. A member of SBAND may deduct the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues without such member's consent.

3. SBAND shall provide periodic notice to its membership of any expenditures that deviate from its [sic] pre-collection notice. SBAND shall also provide notice of any position it adopts regarding legislative proposals and initiated and referred measures within two weeks of SBAND's vote to adopt such positions. After being emailed to members of SBAND, such notices will be readily accessible at www.sband.org.
4. A member of SBAND who contends SBAND incorrectly set the amount of dues which can be withheld must deliver to SBAND a written objection. Any such demand shall be delivered to the Executive Director of SBAND within 30 days of receipt of the member's dues statement or any additional notice, and if not so submitted any such claim shall be considered time barred. SBAND's Board of Governors will address each objection, and if the member is not satisfied with the Board's decision, the

member may demand binding dispute resolution which shall be conducted by Mediator Karen Klein, or someone she so designates. The objecting SBAND member may object to mediator Klein or her designee in which case the parties shall mutually agree upon a mediator.

5. If one or more timely demands for binding dispute resolution are delivered, the stat [sic] bar shall promptly submit the matter to binding dispute resolution before Mediator Karen Klein or someone she so designates. The objecting SBAND member may object to mediator Klein or her designee in which case the parties shall mutually agree upon a mediator. All such demands for binding dispute resolution shall be consolidated for binding dispute resolution. No later than 7 calendar days before binding dispute resolution, any member, having given written objection pursuant to paragraph 4 and requesting binding dispute resolution, may file with the mediator a statement specifying with reasonable particularity each activity he or she believes should not be supported by compulsory dues under this paragraph and the reasons for the objection. SBAND will have the burden to show that the disputed activities are germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990). The costs of the binding dispute resolution shall be paid by SBAND.
6. In the event the decision of the mediator results in an increased pro rata deduction of dues for members who have delivered timely

demands for binding mediation for a fiscal year, the state bar shall provide such increased pro rata deduction to all members who did not consent to funding nonchargeable activities, as well as members first admitted to the state bar during that fiscal year and after the date of the mediator's decision.

See Docket No. 42-3

The United States Supreme Court has validated this prior-year calculation process in the union dues context. *See Hudson*, 475 U.S. at 307, n. 18. The Court concludes that the new “Keller Policy” provides procedural safeguards which comport with long-established precedent. Further, the Supreme Court specifically stated in the context of an integrated bar in *Keller* that the “opt-out” procedures established under *Hudson* satisfied constitutional requirements. *See Keller*, 496 U.S. at 16.

The Plaintiff's reliance on *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012) for the proposition that the “opt-out” procedures are unconstitutional, and that *Keller* and *Hudson* should be overturned, is misplaced. The Supreme Court in *Knox* was careful to distinguish the “opt-out” procedures accepted in *Hudson*, in the context of annual dues assessments, from procedures which are required in the context of mid-year special assessments and dues increases. The special assessment at issue in *Knox* was significantly different in nature from typical union annual dues assessments. Specifically, the temporary mid-year special assessment in *Knox* was to be utilized 100% to fund a “Political

Fight-Back Fund,” to achieve the union’s political objectives in upcoming elections. In this context, the Supreme Court determined the union should have sent out a new *Hudson* notice regarding the special assessment (in addition to the annual dues *Hudson* notice), noting it made no sense to apply the same chargeable versus non-chargeable expense allocations utilized for the annual dues assessment to the special assessment.

In essence, Fleck is requesting that long-standing precedent upholding the validity of “opt-out” procedures as established by the Supreme Court in *Hudson* (1986), and directly applied to integrated bars in *Keller* (1990), be overruled. This Court is unwilling to do that.

In *Knox*, the Supreme Court did not determine the “opt-out” procedure to be unconstitutional in relation to annual dues assessments. State bar associations across the country have modified their licensing procedures since *Keller* was decided in 1990, to come into compliance with the *Hudson/Keller* requirements, including the “opt-out” procedure at issue in this lawsuit. Similarly, public unions across the nation have modified their procedures related to compulsory dues to come into compliance with the “opt-out” procedures of *Hudson*. See *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977) (upholding the constitutional validity of compelling employees to support collective bargaining representative and rejecting the notion the only funds from non-union members that a union constitutionally could use for political or ideological causes were those funds that the non-union member affirmatively consented to pay.); *Mitchell v. Los Angeles*

Unified School District, 963 F.2d 258, 260-63 (9th Cir. 1992) (discussing a long line of Supreme Court cases supporting the utilization of “opt-out” procedures, citing *Abood* in rejecting a claim that an “opt-in” procedure is constitutionally required, and holding that “opt-out” procedures followed by the union to give dissenting non-union members an opportunity to object to full agency fee assured protection of non-members’ First Amendment rights). This Court is unaware of any federal or state court which has interpreted *Knox* to hold that the “opt-out” procedures established in *Hudson* are unconstitutional, or that the “opt-in” procedures advocated by the Plaintiff are constitutionally required. Further, neither party has cited any case that has reached such a holding to date.

In summary, the Court has not been presented with any facts or case law which supports an inference that SBAND’s new procedural safeguards infringe on the Plaintiff’s constitutional rights to free association and speech. The Court holds, as a matter of law, that SBAND’s “opt-out” procedure is reasonable and constitutionally permissible under current United States Supreme Court precedent. The Court grants summary judgment in favor of the Defendants on the second claim for relief.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties’ briefs, and relevant case law. For the reasons set forth above, the Plaintiff’s motion for

summary judgment (Docket No. 43) is **DENIED** and the Defendant's cross-motion for summary judgment (Docket No. 48) is **GRANTED**. Accordingly, all of the Plaintiff's remaining claims are dismissed with prejudice and judgment is entered in favor of the Defendants.

IT IS SO ORDERED

Dated this 28th day of January, 2016.

/s/ Daniel L. Hovland

Daniel L. Hovland,
District Judge
United States District Court

United States District Court
District of North Dakota

Arnold Fleck,
Plaintiff,

vs.

Joe Wetch, 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.

JUDGMENT IN
A CIVIL CASE

(Filed Jan. 28, 2016)

Case No. 1:15-cv-13

-
- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.
- Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

- Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.
- Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

The Plaintiff's motion for summary judgment (Docket No. 43) is DENIED and the Defendant's cross-motion for summary judgment (Docket No. 48) is GRANTED. Accordingly, all of the Plaintiff's remaining claims are dismissed with prejudice and judgment is entered in favor of the Defendants.

Date: January 28, 2016

ROBERT J. ANSLEY, CLERK OF COURT

by: /s/ Jeanene Thompson, Deputy Clerk

RELEVANT NORTH DAKOTA STATUTES**N.D. Cent. Code § 27-11-01**

Practicing law and serving on courts of record without certificate of admission and without payment of annual license fee prohibited – Penalty. Except as otherwise provided by state law or supreme court rule, a person may not practice law, act as an attorney or counselor at law in this state, or commence, conduct, or defend in any court of record of this state, any action or proceeding in which the person is not a party concerned, nor may a person be qualified to serve on a court of record unless that person has: 1. Secured from the supreme court a certificate of admission to the bar of this state; and 2. Secured an annual license therefor from the state board of law examiners. Any person who violates this section is guilty of a class A misdemeanor.

N.D. Cent. Code § 27-11-22

Annual licenses to practice law and to serve on certain courts – Requirement – Issuance – Fees. A person who has an unrevoked certificate of admission to the bar of this state and who desires to engage in the practice of law, or who is to serve as a judge of a court of record, must secure an annual license from the state board of law examiners on or before January first of each year. The secretary-treasurer of the board shall issue the license upon compliance with the rules adopted or approved by the supreme court to assure

the professional competence of attorneys, and upon payment of a fee established by the state bar association at its annual meeting, by a majority vote of its members in attendance at the meeting, not to exceed four hundred dollars. The license is valid for the calendar year for which it is issued. Issuance of an annual license to practice law may not be conditioned upon payment of any surcharge, assessment, or fee in excess of the maximum fee established by this section. This section does not prohibit imposition of a reasonable fee for filing and processing reports of compliance with continuing education requirements.

N.D. Cent. Code § 27-11-23

Fees from annual licenses to be deposited in state bar fund. The secretary-treasurer of the state board of law examiners shall deposit and disburse all fees and moneys collected by the board in accordance with section 54-44-12.

N.D. Cent. Code § 27-11-24

Expenditure of state bar fund. Moneys in the state bar fund must be used to pay:

1. The bar association of the state of North Dakota the sum required to be paid under section 27-12-04;

2. The compensation and expenses allowed by law to each member and to the secretary-treasurer of the state board of law examiners;

3. The expenses incurred by the state board of law examiners in conducting examinations of applicants for admission to the bar of this state and expenses of the board or a grievance committee of the supreme court in investigating charges warranting the suspension or disbarment of members of the bar, or in prosecutions brought and conducted before the supreme court for the discipline of such members;

4. The expenses incurred by the bar association of the state of North Dakota in conducting investigations and prosecutions of proceedings instituted for the purpose of protecting the public and the bar of North Dakota against unauthorized practice by corporations, limited liability companies, or persons not licensed to practice law; and

5. The necessary expenses of conducting and supplying the offices of the state board of law examiners.

N.D. Cent. Code § 27-12-02

Membership of state bar association. The membership of the state bar association of North Dakota consists of every person:

1. Who has secured an annual license to practice law in this state from the state board of law examiners in accordance with section 27-11-22; or

2. Who has an unrevoked certificate of admission to the bar of this state and who has paid an annual membership fee to the state bar association. The annual fee must be established by the state bar association at its annual meeting, by a majority vote of its members in attendance at the meeting, not to exceed eighty percent of the maximum fee for an annual license to practice law in this state as prescribed in section 27-11-22.

N.D. Cent. Code § 27-12-04

Moneys payable from state bar fund to state bar association. The state bar association of North Dakota, out of the state bar fund, must receive for operation of the lawyer discipline system seventy-five dollars of each license fee beginning January 1, 1999. Eighty percent of the remaining amount of the annual license fees paid by licensed members must be paid to the state bar association for the purpose of administering and operating the association. These sums must be paid quarterly to the association by the state board of law examiners upon vouchers drawn in accordance with section 54-44-12.

U.S. CONST., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

Arnold Fleck) Civil No.
) 1:15-CV-00013
Plaintiff,)

v.)

Jack McDonald, President)
of the State Bar Association)
of North Dakota; Aubrey) **JOINT**
Fiebelkorn-Zuger, Secretary) **STIPULATION OF**
and Treasurer of the State) **PARTIAL CASE**
Bar Association of North Da-) **RESOLUTION AND**
kota; Tony Weiler, Executive) **BRIEFING SCHED-**
Director of the State Bar) **ULE REGARDING**
Association of North Dakota;) **DISPOSITIVE**
and Penny Miller, Secretary-) **MOTIONS**
Treasurer of the State Board) (Filed Nov. 20, 2015)
of Law Examiners, in their)
official capacities,)
Defendants.)

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 20th 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

Attorneys for Plaintiff,

Arnold Fleck

Dated this 20th day of November, 2015.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: /s/ Randall J. Bakke

Randall J. Bakke (#03898)

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(701) 258-0630

rbakke@smithbakke.com

bwiederholt@smithbakke.com

43a

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

Dated this 20th 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 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 329-4300
dbahrAnd.gov

Attorney for Defendant,
Penny Miller

[Certificate of Service Omitted]

EXHIBIT 1

NORTH DAKOTA STATE BOARD OF LAW EXAMINERS
 JUDICIAL WING 1ST FL
 600 E. BOULEVARD AVE
 BISMARCK, ND 58505-0530

STATEMENT OF LICENSE FEES DUE

(Return complete statement with check. No credit cards accepted.)

Section 27-11-22, NDCC, provides every person engaged in the practice of law or who serves as a judge of a court of record shall secure an annual license **ON OR BEFORE JANUARY 1 OF EACH CALENDAR YEAR.**

PLEASE NOTIFY THIS OFFICE OF ANY CHANGES IN THE ABOVE INFORMATION

**REQUIRED ANNUAL CERTIFICATE OF COMPLIANCE TO
 CLERK OF THE SUPREME COURT**

I certify that I have read rule 1.15, N.D. Rules of Professional Conduct and that:

A. TRUST ACCOUNT

_____ I am in compliance with Rule 1.15. My trust account is:

Account Number _____

Financial Institution _____

OR

_____ I am exempt from Rule 1.15 because:

_____ I do not actively practice law.

_____ I am admitted in, or associated with a law firm located in another jurisdiction where a trust account is maintained.

_____ I do not hold client funds because:

_____ I am a full time judge, corporate counsel, or government attorney.

_____ I **never** hold property of clients or third persons.

_____ Other: Please explain

B. MALPRACTICE INSURANCE

_____ I represent private clients

_____ I am currently covered by professional liability insurance and intend to maintain such insurance during the next 12 months.

_____ I am **NOT** covered by professional liability insurance.

_____ Other: Please explain

_____ I do not represent private clients.

SIGNATURE: _____

LAW FIRM: _____

**STATE BAR ASSOCIATION OF NORTH DAKOTA
 ANNUAL SBAND SECTION
 ENROLLMENT FORM**

- | | |
|---|--|
| <input type="checkbox"/> Administrative & Government Lawyers – \$10 | <input type="checkbox"/> Real Property, Probate & Trust Law – \$25 |
| <input type="checkbox"/> Business & Corporations – \$10 | <input type="checkbox"/> Taxation – \$10 |
| <input type="checkbox"/> Criminal Defense – \$10 | <input type="checkbox"/> Women Lawyers – \$10 |
| <input type="checkbox"/> Family Law – \$25 | <input type="checkbox"/> Elder Law – \$10 |
| <input type="checkbox"/> Legal Economics – \$10 | |

Subtotal \$ _____

ND BAR FOUNDATION

- | | |
|--|------------|
| <input type="checkbox"/> Sustaining Member (Annual) | \$ 25.00 |
| <input type="checkbox"/> Donor (\$500 total or \$50 Annual) | \$ 50.00 |
| <input type="checkbox"/> Patron (\$1,000 total or \$100 Annual) | \$ 100.00 |
| <input type="checkbox"/> Silver Patron (\$2,500 total or \$250 Annual) | \$ 250.00 |
| <input type="checkbox"/> Gold Patron (\$5,000 total or \$500 Annual) | \$ 500.00 |
| <input type="checkbox"/> Platinum Patron (\$10,00 total or \$1,000 Annual) | \$1,000.00 |

Pro Bono Fund

_____ Hours (\$85/hour) \$ _____

Subtotal \$ _____

OPTIONAL: Keller deduction relating to nonchargeable activities. Members (\$ _____) wanting to take this deduction may deduct \$10.07 if paying \$380; \$8.99 if paying \$350; and \$7.90 if paying \$325. (See Insert.)

**TOTAL SECTION AND FOUNDATION
 FEES REMITTED**

TOTAL \$ _____

MAKE ALL CHECKS PAYABLE TO: STATE BOARD OF LAW EXAMINERS

600 E. BOULEVARD AVE, BISMARCK, ND 58505-0530

**INSTRUCTIONS FOR COMPLETING
LICENSE RENEWAL FORM**

The following information ***MUST BE COMPLETED*** on the Statement of License Fees/Certificate of Compliance.

1. **Verify your address, phone, fax, and e-mail information is correct.** Changes can be handwritten directly on the statement.
2. **Lower left portion of the statement – *Mandatory*:**
 - Answer section A regarding Trust Account Information
 - Answer section B regarding Malpractice Insurance
 - Sign the certificate and identify your law firm name, if applicable.
3. **Lower right portion of the statement – *Optional*:**
 - If you choose to enroll in any section of the State Bar Association, please send one check or money order which includes your license fee and the additional section fees.
 - If you choose the optional Keller deduction, please deduct that amount from the total section and foundation fees to be remitted. See enclosed insert explaining Keller deduction policy.

4. Return the **complete** Statement (not just the top half) with your check or money order. The statement must accompany your check.

No credit card payments are accepted.

Please note: Licenses expire on December 31. You will not be licensed for the following calendar year without the completed license statement and fees on file in the Board office on December 31.

Failure to properly complete and return the license statement and provide the appropriate fees will result in a delay of your licensure.

Thank you.

EXHIBIT 2

[LOGO]

State Bar Association of North Dakota

**NOTICE CONCERNING STATE BAR DUES
DEDUCTION AND MEDIATION PROCESS**

I. Overview

In *Keller v. State Bar of California*, the United States Supreme Court held that a mandatory bar may not fund any activities with mandatory dues unless those activities are germane under *Keller*. *Keller* also indicated that a mandatory bar could satisfy its constitutional obligation to ensure that such activities were funded with voluntary payments by adopting a procedure that allows dissenting members the opportunity

to object, and further deduct a pro rata amount spent on those activities. The Court also indicated that a bar association could provide a mechanism to challenge the calculation of the deduction, similar to previous cases where mandatory union dues were in dispute.

Activities not germane under *Keller v. State Bar of California* are considered to be “nonchargeable.” SBAND may use compulsory dues of all members for all other activities, provided the activities are germane under *Keller*, and these activities are considered to be “chargeable.” The method used to calculate the amount of the dues deduction is based on the method approved in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). In that case, the Court indicated that labor unions may use the year for which the most recent audit report is available as the base line period for determining chargeable and nonchargeable activities and calculating the cost of the nonchargeable activities.

To calculate this year’s dues deduction, SBAND’s Executive Committee used this historical approach and reviewed activities for the fiscal year ending December 31, 2014 (FY14), the most recent fiscal year for which there is an audit report. A copy of the audit report can be found at: <https://www.sband.org/About%20the%20Bar/FinancialAudits.aspx>

The Committee looked at SBAND’s activities during FY14 to identify chargeable and nonchargeable activities. For each activity found to be nonchargeable, SBAND calculated the cost of the activity, including all

applicable overhead and administrative costs, and determined the amount of dues expended on the activity. That process resulted in the determination that \$57,565 of dues was expended on nonchargeable activities during FY14.

II. Dues Deduction for FY16

As stated above, to calculate the cost of dues expended on chargeable and nonchargeable activities, SBAND used the year for which the most recent audit report exists, that is, FY14. SBAND reviewed all activities not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1991 [sic]).

Each SBAND member's FY16 pro rata portion of the dues devoted to nonchargeable activities was calculated by a process that involved dividing the amount spent on nonchargeable activities by the estimated number of total license fee paying members for 2016 (2,900). In FY14 license fee income (excluding Discipline, Pro Hac Fees, and Client Protection Fund) totaled \$618,584. License fee income comprises 48% of our total revenue, and therefore the number used to determine any nonchargeable amount is 48% of the expense, or the proportionate amount of dues spent on nonchargeable activities.

There are three dues levels. Members with five plus years of practice pay \$380, those with between one and five years pay \$350, and those with less than one year pay \$325. In making the calculation, we estimated the number of attorneys we anticipate will be in each level

in FY16. We estimate 1,785 that will pay \$380, 800 that will pay \$350, and 315 that will pay \$325. Under state law, \$75 of each license fee must be received by SBAND for operation of the lawyer discipline system. 80% of the remaining amount of the annual license fee comes to SBAND for administering and operating the association, and 20% goes to the Board of Law Examiners. For a member paying the full license fee, that leaves SBAND with \$244. Further, \$16 of every license fee is dedicated to the Client Protection Fund.

For 2016, members paying \$380 may deduct \$10.06, members paying \$350 may deduct \$8.98, and members paying \$325 may deduct \$7.89.

III. Detailed Calculation of the Dues Deduction

2014 License Fee Income (excluding Discipline, Pro Hac Fees and Client Protection Fund)	\$ 618,584
2014 Unrestricted Total Revenue	\$1,290,521
2014 Nonchargeable Expenses (2014 Audit)	
ABA Delegate	\$ 2,319.00
Keeping Kids First	\$46,526.00
Tony Weiler Time Legislative	\$ 827.00
Tony Weiler Time KKF	<u>\$ 3,694.00</u>
	\$53,366.00

2014 Overhead costs for nonchargeable expenses

SBAND looked at its total budget to determine overhead costs (such as rent, utilities, copying charges, etc.)

and calculated those to be \$95,855. Nonchargeable expenses total \$53,366 which is .04% of our overall expense budget. To calculate overhead costs associated with nonchargeable activities, SBAND multiplied \$53,366 times .04% for a total of \$4,199. That amount was added to \$53,366 for total nonchargeable expenses of \$57,565.

2014% of Revenue from Dues

48% x \$57,565 equals \$27,631 for FY14, and the amount of dues used on nonchargeable activities in FY14, and used in the FY16 Keller calculations.

IV. Objections to SBAND's Chargeability Determinations

The detailed calculation provided above in Section III is intended to be read in conjunction with the previous fiscal year's audit report, which can be found here: [[https://www.sband.org/About%20the%20Bar/Financial Audits.aspx](https://www.sband.org/About%20the%20Bar/Financial%20Audits.aspx)]. Any expenditure found in the audit report not listed in this section has been determined by SBAND to be chargeable. Should any member determine that any expenditure or category of expenditure in the audit report is nonchargeable but not included in Section III, that member shall submit a written objection to the Executive Director of the State Bar within 30 days of the receipt of the dues statement. For details on the objection process, see SBAND's Keller Policy located at [www.sband.org/About the Bar](http://www.sband.org/About%20the%20Bar).

EXHIBIT 3

SBAND KELLER POLICY

1. The State Bar Association of North Dakota (“SBAND”) may engage in and fund any activity that is reasonably intended for the purposes of the association which are set forth in Article 2 of the Constitution of SBAND, permitted by the by-laws of SBAND, or as otherwise statutorily authorized. SBAND may not use the compulsory dues of any member who objects pursuant to paragraph 3 of this policy for activities that are not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Expenditures that are not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990) may be funded only with user fees or other sources of revenue, or those portions of member compulsory dues for which no objection has been made pursuant to paragraph 3 unless any such objection has been determined against the objecting member by a neutral mediator.

2. Prior to the beginning of each fiscal year, SBAND shall publish written notice of the activities that can be supported by compulsory dues (“chargeable”) and the activities that cannot be supported by compulsory dues (“nonchargeable”). The notice shall estimate the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member’s pro rata portion, according to class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues without such

member's consent. The notice shall be sent to every member of SBAND together with the annual dues statement. A member of SBAND may deduct the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues without such member's consent.

3. SBAND shall provide periodic notice to its membership of any expenditures that deviate from its pre-collection notice. SBAND shall also provide notice of any position it adopts regarding legislative proposals and initiated and referred measures within two weeks of SBAND's vote to adopt such positions. After being emailed to members of SBAND, such notices will be readily accessible at www.sband.org.

4. A member of SBAND who contends SBAND incorrectly set the amount of dues which can be withheld must deliver to SBAND a written objection. Any such demand shall be delivered to the Executive Director of SBAND within 30 days of receipt of the member's dues statement or any additional notice, and if not so submitted any such claim shall be considered time barred. SBAND's Board of Governors will address each objection, and if the member is not satisfied with the Board's decision, the member may demand binding dispute resolution which shall be conducted by Mediator Karen Klein, or someone she so designates. The objecting SBAND member may object to mediator Klein or her designee in which case the parties shall mutually agree upon a mediator.

5. If one or more timely demands for binding dispute resolution are delivered, the state bar shall promptly submit the matter to binding dispute resolution before Mediator Karen Klein or someone she so designates. The objecting SBAND member may object to mediator Klein or her designee in which case the parties shall mutually agree upon a mediator. All such demands for binding dispute resolution shall be consolidated for binding dispute resolution. No later than 7 calendar days before binding dispute resolution, any member, having given written objection pursuant to paragraph 4 and requesting binding dispute resolution, may file with the mediator a statement specifying with reasonable particularity each activity he or she believes should not be supported by compulsory dues under this paragraph and the reasons for the objection. SBAND will have the burden to show that the disputed activities are germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990). The costs of the binding dispute resolution shall be paid by SBAND.

6. In the event the decision of the mediator results in an increased pro rata deduction of dues for members who have delivered timely demands for binding mediation for a fiscal year, the state bar shall provide such increased pro rata deduction to all members who did not consent to funding nonchargeable activities, as well as members first admitted to the state bar during that fiscal year and after the date of the mediator's decision.
