

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

ProBLAC, an organization, et. al

Plaintiffs,

vs.

CITY OF OMAHA, a Municipal
Corporation; and TODD SCHMADERER
and MARK MATUZA, in their Individual
and Official Capacities;

Defendants.

CASE NO 8:20-CV-400

**AMENDED
UNOPPOSED MOTION TO
ADOPT SETTLEMENT
AGREEMENT**

Plaintiffs move pursuant to Rule 41(a)(2) for an Order adopting the Settlement Agreement executed by the parties December 30, 2020 and attached hereto as Exhibit A.

In support of their motion, Plaintiffs show the Court as follows:

1. In accordance with the agreement, Defendants do not oppose the motion.
2. The Settlement Agreement is fair, reasonable and adequate.¹

WHEREFORE, Plaintiffs request an Order:

- a. Approving and adopting the Agreement and incorporating it into the Order of this Court;
- b. Retaining jurisdiction to enforce its terms; and
- c. Dismissing Plaintiffs claims in accordance with the Agreement.

¹ See, *Ne. Iowa Citizens for Clean Water v. AgriProcessors, Inc.*, 469 F. Supp. 2d 666, 672 (N.D. Iowa 2006).

ProBLAC, a non-profit organization, and
ALEXANDER MATTHEWS; JORDAN CORBIN
DARREN RENFROW; JOSHUA AUGUSTINE;
LIYA WHATCOTT; RILEY WILSON; KATELYN
HUCKINS; and MELANIE BUER, as individuals,
Plaintiffs

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/s/ Daniel H. Friedman
Daniel H. Friedman #22293
Stephen A. Sael #25970

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of January, 2021, the foregoing Unopposed Motion to Adopt Settlement Agreement was served on all parties registered with the CM/ECF system, which will send electronic notice of the foregoing to those registered with the Court.

Adam J. Sipple
Attorney for Plaintiff

EXHIBIT A

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SETTLEMENT AGREEMENT

ProBLAC, Alexander Matthews, Jordan Corbin, Joshua Augustine, Darren Renfrow, Riley Wilson, Katelyn Huckins, Melanie Buer, and Liya Whatcott (“Plaintiffs”) and the City of Omaha, Chief Todd Schmaderer and Captain Mark Matuza (“Defendants”) enter into this Settlement Agreement (“Agreement”) with the hope that it will end litigation and help safeguard the constitutional rights of all members of the Omaha community, enhance officer and public safety, and increase public confidence in the Omaha Police Department (“OPD”). Pursuant to the agreement, the parties will stipulate to dismissal of all claims made as further set forth herein.

AGREEMENT

I. Dismissal and Withdrawal of Litigation

1. Defendants agree to withdraw and move for dismissal of any appeals filed for review of the Order entered by Judge Marcena Hendrix sustaining motions to quash in the cases arising from the arrests during the Farnam Street March on July 25, 2020; to file no new appeals from Judge Hendrix’s order; to issue no new charges related to the Farnam Street March referenced in the Complaint (Filing 1); and to dismiss with prejudice any pending charges for violation of Sections 20-44 or 20-45 against any person present at the Farnam Street march.

2. Plaintiffs agree Defendants' consent to entry of the Agreement should not be construed, in any way, as an admission that any conduct of the City or its agents, including Chief Schmaderer or Captain Mark Matuza, violated any constitutional provision or was otherwise contrary to law. Plaintiffs further agree Defendant's entry into the Agreement shall not be relied upon as such by any party to this agreement in support of any claim.

3. In consideration of the Defendants' entry into this Agreement, and pursuant to and in accordance with its terms, Plaintiffs ProBLAC Matthews, Corbin, Augustine and Renfrow agree to entry of an Order incorporating this agreement and dismissing their claims for declaratory or injunctive relief (Count I) without prejudice as set forth in Section II of this Agreement.

4. In consideration of the Defendant's entry into this agreement, and their agreement with Defendants, Plaintiffs Matthews, Corbin, Buer, Wilson, Whatcott and Huckins agree to dismissal with prejudice of their individual claims for excessive force and/or unlawful arrest (Counts II and III) upon the Court's entry of a Decree pursuant to this Agreement.

5. In consideration of the Defendant's entry into this agreement between the parties, all Plaintiffs agree to dismissal with prejudice of their individual claims for First Amendment Retaliation (Count IV) upon the Court's entry of a Decree pursuant to this Agreement.

II. OPD Response to First Amendment-Protected Activity

6. Both parties acknowledge that First Amendment-protected activities serve important societal functions, including promoting transparency in government affairs, ensuring accountability of public officials, and encouraging community feedback—whether critical or laudatory—that ultimately reduce tension and foster a sense of openness and trust between law enforcement and the public.

7. Defendants will promptly and in good faith make all reasonable and necessary efforts to support enactment by the City Council of revised sections 20-44 and 20-45 of the O.M.C., attached hereto as Exhibit A. This shall include prompt presentation to the City Council for approval, and full support of the Ordinance to members of the City Council upon entry of this agreement. The efforts will commence promptly following execution of this Agreement and shall be pursued independently of the parties' efforts toward dismissal of Plaintiffs' claims and entry of the Decree in accordance with this Agreement.

8. In the event the revised ordinances do not pass 60 days from execution of this agreement, or are amended in any way during the legislative process: (1) Plaintiffs shall have the right to renew their claims for declaratory and injunctive relief related to City Ordinances 20-44 and 20-45 either in this proceeding or by filing of a new action.

9. In the event the revised ordinances do pass, all other provisions, and any order of the Court approving and adopting them, shall remain in full force and effect, to wit: Section I (dismissal of claims), Section III (Use of Chemicals), Section IV (Publication of Policies), and Section V (Reporting), as well as Sections VI, VII and VIII regarding enforcement.

10. Defendants have and will continue to adopt policies to ensure that all OPD personnel are properly trained regarding the First Amendment rights of all persons, and that all current uniform patrol officers will be provided specific training regarding the new ordinances prior to termination of the Decree entered herein.

III. Use of Force During Protests and Marches

11. Defendants and OPD will continue to provide clear policy, training, and supervisory direction prohibiting officers from doing the following:

- a. Using chemical agents, whatever the method of deployment, against any person engaged in expressive, non-violent activity in the City of Omaha, except as follows:
 - i. The chemical agents are targeted to impact a specific individual(s) for whom there exists probable cause to arrest the person(s) targeted; the officer issues clear and unambiguous warnings that the person(s) is subject to arrest and such chemical agents will be used; and the officer has provided the person(s) sufficient opportunity to heed the warnings and comply with lawful law enforcement commands when feasible; or
 - ii. Persons in the immediate vicinity of where the chemicals are deployed present an imminent threat of bodily harm to persons or damage to property; and the use of arrest teams, surveillance or other law-enforcement tactics would be to no avail, making use of chemical agents necessary as a last resort to protect against injury to members of the public or law-enforcement officers;

b. For purposes of the foregoing subsection, “chemical agents” shall include the following:

- i. Pepper-ball guns or pepper spray
- ii. OC Spray
- iii. Mace
- iv. Grenades of any kind or type, including flash-bang grenades, CS grenades or tear-gas grenades;
- v. Foam rounds or “rubber-bullets” of any kind or type.

12. Defendants agree to provide clear policy and supervisory direction to require clear verbal commands before each deployment of chemical agents.

13. Defendants will continue to provide clear policy, training, and supervisory direction to ensure that: (a) all officers who respond to a protest or public demonstration either in standard uniform or wearing tactical dress or other protective equipment will have readily visible identification of their name and badge number; and (b) all officers will verbally respond to requests for their last name and badge number.

14. Defendants have and will continue to adopt and enforce policies providing that only the Chief of Police, a Deputy Chief of Police or a Captain may order a mass arrest.

IV. Accessibility of OPD Policies

15. The City will continue to maintain a complete, up-to-date manual of all OPD policies, procedures, general orders, and special orders that is organized and maintained in a manner that makes it easily accessible and clear to officers, employees, and others, including making it available online to the public in a searchable electronic format except, in conformity with current policy and practice, those sections that are determined to be tactical.

16. The City agrees that revisions and updates to OPD policies, procedures, and orders will be incorporated into the publicly available manual in a timely fashion, except those sections that are determined to be tactical.

V. Compliance Reporting

17. No later than February 1, 2021, and thirty days prior to expiration of this agreement, Defendants agree to produce a report describing its compliance with respect to this agreement. When completed, this report will be made available to the public via hard copy and

online in a readily accessible electronic format. The annual report will address, the deployment of chemical agents, including at a minimum:

- a. Number of deployments
- b. Type of chemical agent used
- c. Description of the law-enforcement purpose of the use of the chemical agent
- d. Whether the deployment was within policy standards
- e. Whether there were any complaints associated with the deployment and the general outcome of the complaint including whether or not any discipline was issued
- f. Whether there were any injuries associated with the deployment.

VI. Entire Agreement

18. This Agreement shall constitute the entire integrated agreement of the Parties. No prior drafts or prior or contemporaneous communications, oral or written, shall be relevant or admissible for any purpose in this litigation or any other proceeding.

19. All parties agree this is a negotiated agreement. Defendants agree that Plaintiffs' entry into this agreement should not be construed as a waiver of any motions or defenses in any subsequent criminal proceeding alleging a violation of the revised version of O.M.C. §§20-44 or 20-45. Defendants further agree Plaintiffs' entry into this agreement should not be construed as their explicit or tacit approval of the use of chemical agents in the manner allowed under the agreement.

VII. Term

20. The term of this Agreement shall be for two years commencing upon entry of this Decree by the Court and expiring by its own terms two years thereafter. The Court will retain jurisdiction of this action for all purposes until such time two-year period passes, or upon resolution of any issues timely raised by appropriate pleading and pending at the end of that two-year period.

VIII. Entry and Enforcement

21. The existing stay agreed upon by the parties shall be extended indefinitely for the purpose of affording the parties time to request and the Court time to consider entry of an Order approving and adopting the Agreement. In the event the Agreement is not accepted and adopted by the Court, in whole, for any reason, the agreement will be considered void and Plaintiffs will

have the right to terminate the stay and request resolution by the Court of either or both existing requests for declaratory or injunctive relief, and to prosecute Counts II, III and IV of the Complaint.

22. Upon entry into the Agreement by both parties, the parties will jointly move pursuant to Rule 41(a)(2) Fed. R. Civ. P. for an Order: (a) approving and adopting the Agreement; (b) incorporating the Agreement into the Order entered on the motion; (c) retaining jurisdiction to enforce its terms if necessary; and (d) dismissing all claims as provided in paragraphs 3, 4 and 5 above.

23. In accordance with Rule 65 Fed. R. Civ. P., any Order entered pursuant to the Agreement shall bind, upon actual notice, the parties; the parties' officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with the foregoing parties and their agents.

24. This Agreement and any Order entered thereon, shall be enforceable by all means provided by law. At all times, the City and OPD will bear the burden of demonstrating full and effective compliance with this Agreement. Plaintiffs will consult with officials from the City before instituting enforcement proceedings and will make a good-faith attempt to resolve any disputes before seeking intervention from the Court.

AGREED AND EXECUTED this 30th day of December, 2020 by:

ProBLAC, an organization, and
ALEXANDER MATTHEWS; JORDAN CORBIN
DARREN RENFROW; JOSHUA AUGUSTINE;
LIYA WHATCOTT; RILEY WILSON; KATELYN
HUCKINS; and MELANIE BUER, as individuals, Plaintiffs

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CITY OF OMAHA, et al., Defendants

A handwritten signature in cursive script, appearing to read "Michelle Peters", is written over a horizontal line.

By s/Michelle Peters
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EXHIBIT A

Sec 20-44 – Obstructing public roadways.

(a) It shall be unlawful for any person purposely or knowingly to obstruct any highway, street or other public roadway, by rendering passage by others unreasonably inconvenient or hazardous, whether the obstruction arises from his or her acts alone or acting in concert with a group of others, without having a permit issued by the City or being otherwise exempted from the permit requirement by Sec. 20-293 of this Code.

(b) If conduct that would otherwise violate this section consists of speech, or gathering with others to hear or observe such speech, or of gathering with others to picket or otherwise engage in nonviolent expression, the actor must be informed that they are obstructing traffic and ordered to move or disperse, and be given reasonable time to comply with the order, prior to being subject to arrest or citation.

- i. The order required by this subsection may be given by a peace officer, a fireman, or a city code enforcement official.

(c) No person shall be guilty under this section if:

- i. No order was given;
- ii. An order, if given, was unreasonable in scope; or
- iii. An order, if given, was promptly obeyed.

(d) If the conduct that would otherwise violate this section is committed by a person under 16 years of age, no arrest shall occur until the parent or guardian has been warned of the conduct, after which subsequent violation may result in arrest of such minor and/or their parent.

Et. A-1

Section 20-45 – Refusing Lawful Request to Move

1. Except as provided in Sec. 20-44(a), it shall be unlawful for any person to purposely or knowingly fail or refuse to obey a reasonable official request or order to move to:

(a) Prevent an obstruction of a highway, street or other public roadway; or

(b) Maintain public safety by dispersing persons gathered in dangerous proximity to a fire or other emergency.

2. No person shall be guilty under this section if:

(a) An order, if given, was unreasonable in scope; or

(b) An order, if given, was promptly obeyed

Ex. A-2