

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH R. McMAHON, III

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CIVIL ACTION

08-5030

VERSUS

CASE No.:

SECT. S MAG. 4

THE CITY OF NEW ORLEANS and
AMERICAN TRAFFIC SOLUTIONS, INC.

JUDGE

MAGISTRATE

COMPLAINT – CLASS ACTION

The Class Action Complaint of the plaintiff, Joseph R. McMahon, III, a person of the full age of majority and residents of Louisiana, on behalf of himself and all Putative Class Plaintiffs similarly situated, is brought pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, 42 U.S.C.A. §1983 and 28 U.S.C.A. §1332(d), and the Constitution of the State of Louisiana of 1974, as follows:

1.

Made defendants herein are:

1. **The City of New Orleans**, a political sub-division of the State of Louisiana; and
2. **American Traffic Solutions, Inc.**, a foreign company domiciled in Kansas, with its principal place of business in Scottsdale, Arizona.

2.

Jurisdiction is proper in this Court pursuant to 28 U.S.C.A. §1331 and §1367.

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3.

Venue is proper in this Court pursuant to 28 U.S.C.A. §1391(b).

COUNT 1: FEDERAL CLAIMS

4.

Defendants, acting under color of law, have violated the rights of the Putative Class Plaintiffs that are protected by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as their due process rights and civil rights, by enacting and enforcing Code of Ordinances of the City of New Orleans Chapter 154, Article XVII, Sections 154-1701 through 154-1704, known as the Automated Traffic Enforcement System (“ATES”), as follows:

5.

In January of 2008, the City of New Orleans (“the City”) contracted with the company American Traffic Solutions, Inc. (“ATS”), for the installation of traffic cameras at various locations throughout the City of New Orleans to capture images of vehicles that were speeding or violating intersectional red lights, or both. Pursuant to said contract, it is believed that ATS was not only tasked with the installation of the traffic cameras, but also with the administration of the “civil” ticket collections on behalf of the City that would result from the operation of the red light and speed cameras.

6.

The City of New Orleans adopted the final form of the ATES ordinance, which provides that the photographed moving violations of speeding and entering an intersection while a red light is

showing shall be adjudicated using a “preponderance of the evidence” burden, as Section 154-1702(e) provides:

(e) In an administrative adjudication hearing, the issues must be proved at the hearing by a preponderance of the evidence. The reliability of the automated traffic enforcement system used to produce the recorded image of the violation may be attested to in an administrative adjudication hearing by affidavit of a sworn law enforcement officer or the department of public works. An affidavit of a sworn law enforcement officer or from the department of public works that alleges a violation based on an inspection of the pertinent recorded image is admissible in a proceeding under this article and is evidence of the facts contained in the affidavit.

7.

Defendants eventually began enforcing said ordinance, pursuant to its provisions, by mailing, or causing the mailing of, “civil” tickets to citizens whose vehicles were photographed by automated traffic cameras that captured images of said vehicles while allegedly speeding or during alleged violations of red light traffic signals, demanding the payment of fines while reassuring the recipient:

This violation is a non moving infraction. No points will be assessed and the infraction will not be reported to your insurance company.

8.

Upon information and belief, more thousands of such Notices of Violation have been mailed to individuals to date, pursuant to the ATEs ordinance, and the actual number of those persons who have either sent in payments to satisfy the “civil” tickets, or fought against said tickets in court and lost, or received citations and have yet to respond, is within the defendants’ knowledge.

9.

The Putative Class Plaintiffs, as registered owners of automobiles, each received a Notice of Violation, directly or indirectly, by mail from the defendants for speeding or violating a red light, in alleged violation of the ATES ordinance. According to each Notice of Violation, these alleged traffic violations took place within the City of New Orleans and, hence, provided for the “civil” liability assessed against the named plaintiffs as registered owners of the vehicles in question. At the time of this filing, Putative Class Plaintiff Joseph R. McMahon, III, unsuccessfully contested the unconstitutionality of his ticket and the ATES ordinance at the administrative hearing offered by defendants.

10.

The Putative Class Plaintiff intend to represent the class of all automobile owners ticketed by the defendants for violating the ATES ordinance since its inception who have either 1) paid the fines directly, 2) contested the fines, lost and paid, or 3) not yet paid or contested the fines. As required by Rule 23(a) of the F.R.C.P., the class of automobile owners ticketed by the defendants since the enactment of the ATES ordinance would be so numerous that joinder of all class members would be impracticable. Also, as required by Rule 23(a), questions of law or fact are common to the class, and the claims asserted by the Putative Class Plaintiff would be the same as the claims typically available to the class. Further, as required by Rule 23(a), the Putative Class Plaintiff would fairly and adequately protect the interests of the class.

11.

In addition, Rule 23(b)(1) permits class certification because the prosecution of separate actions by individual class members would create the risk of adjudications that, as a practical

matter, would be dispositive of the interests of other class members not bringing this lawsuit. Also, Rule 23(b)(2) permits class certification because the defendants have acted or refused to act on grounds generally applicable to the class of automobile owners prosecuted, so final injunctive relief and corresponding declaratory relief for the entire class would be appropriate.

12.

The Putative Class Plaintiff would be an adequate representative of the class because he has no conflict of interests with the class as a whole. Indeed, the Putative Class Plaintiff simply received an ATES Notice of Violations that, on an individual basis, exposed each class plaintiff to civil fines for each alleged violation, plus administrative fees and possible court costs. Some plaintiffs paid the fines, others contested and others still have time to choose either option, but every member of the class faced or face this same potential for liability, including the imminent threat of debt collection for failure to pay timely.

13.

The ATES ordinance violates the plaintiff's right against self-incrimination protected by the Fifth Amendment because the ordinance immediately assumes a plaintiff guilty, or liable, of running a red light or speeding simply because the plaintiff is the registered owner of the vehicle photographed. The ATES ordinance then impermissibly places the burden of proving innocence upon the plaintiff, who must either submit an affidavit as to the identity of the offending driver or appear in court to contest the ticket, where the ordinance provides that photographs are already *prima facie* proof of the guilt of the vehicle owner. In a criminal case, the plaintiff could plead "not guilty" and then remain silent, forcing the prosecution to prove the state's case. Under the provisions of the ATES ordinance, however, the photographs already count as *prima facie* proof of

the violation under a “preponderance of the evidence” rule, thus remaining silent under the Fifth Amendment would do nothing to convince the court that the prosecution has not carried its burden of proof. The ATES ordinance therefore is an impermissible attempt by the defendants to shift the burden of proof onto the plaintiffs, using a “civil” scheme, in a manner calculated to deny plaintiff’s Fifth Amendment rights otherwise available during both civil and criminal prosecution. This violation of plaintiff’s civil rights is enforced by the defendants while acting under color of law, in violation of 42 U.S.C.A. §1983.

14.

The ATES ordinance violates the plaintiff’s right to confront the prosecution’s witnesses, as protected by the Sixth Amendment, because the “witnesses” are automated devices, and the penal ordinance is disguised as “civil” in nature. The ATES ordinance therefore is an impermissible attempt by the defendants to suppress the plaintiff’s Sixth Amendment rights otherwise available during criminal prosecution. This violation of plaintiff’s civil rights is enforced by the defendants while acting under color of law, in violation of 42 U.S.C.A. §1983.

15.

The ATES ordinance violates the Putative Class Plaintiff’s constitutional rights to procedural due process protected by the Fourteenth Amendment because the ordinances immediately assumes a plaintiff guilty, or liable, of speeding or running a red light simply because the plaintiff was the registered owner of the photographed vehicle. The ordinance then impermissibly shifts the burden of proving innocence onto the plaintiff, who may not have been the actual driver. Under this scheme, should the plaintiff, who received a Notice of Violation by mail, fail to take affirmative action to prove his or her innocence, or fail to pay the “civil” ticket within

thirty days, he or she would face more fines and possible credit ruin. The ATES ordinance is an impermissible attempt by the defendants to transform existing criminal laws, LSA-R.S. §32:61 and LSA-R.S. §32:232(3) into “civil” violations, in a manner calculated to deny plaintiff’s procedural due process rights otherwise available during criminal prosecution of those traffic laws. These violations of plaintiff’s civil rights are enforced by the defendants while acting under color of law, in violation of 42 U.S.C.A. §1983.

16.

The ATS further violates the Due Process rights of the Putative Class Plaintiffs by having a City traffic hearing officer both presenting the City’s evidence at a hearing and deciding on the evidence and violations therein. The ATS also violates Due Process by requiring a sliding scale filing fee (based on doubling the dollar amount cited in the photo-ticket received) to file for a “judicial review” of the decision of the traffic hearing officer.

17.

Every Putative Class Plaintiff who paid his or her fine directly under the ATES ordinance, and every Putative Class Plaintiff who contested their ticket and lost and paid their fine plus costs, suffered direct property deprivation caused by the defendants’ enactment and enforcement of the ATES ordinance that violated their rights under the Fifth and/or Sixth Amendments, and their due process rights under the Fourteenth Amendment, and a favorable decision herein for the Putative Class Plaintiff would redress this wrong.

Likewise, every Putative Class Plaintiff who has requested a hearing or has one scheduled, or has yet to choose between payment or contest, faces the very imminent threat of property deprivation caused by the defendants’ enactment and enforcement of the ATES ordinance in

violation of their Fifth, Sixth and Fourteenth Amendment rights, and a favorable decision herein for the Putative Class Plaintiff would redress this wrong.

COUNT II: STATE CLAIMS

The Putative Class Plaintiff re-asserts, re-alleges and re-adopts all previous allegations of fact and conclusions of law set forth in Paragraphs 1 through 16, above, as if copied herein *in extenso*.

18.

Defendants, acting under color of law, have violated the rights of the Putative Class Plaintiff that are protected by the Constitution of the State of Louisiana of 1974, as well as his due process rights and civil rights, by enacting and enforcing the ATES ordinance as set forth below. Likewise, the ATES ordinance violates several Louisiana statutes and the Louisiana Highway Regulatory Act, as follows:

19.

The ATES ordinance is invalid, as it lacks enabling legislation from the Louisiana State Legislature. In 2001, 2003 and 2005, enabling legislation was introduced by law makers in Baton Rouge to either amend LSA-R.S. §32:1 *et seq.*, to allow for criminal traffic camera enforcement, to create “civil” traffic camera enforcement and/or to allow certain parishes to adopt traffic camera enforcement.¹ In each instance, the legislation was either roundly defeated by vote or withdrawn. As it stands, the Louisiana State Legislature has **never** passed enabling legislation allowing

individual parishes or municipalities to adopt ordinances enforcing traffic moving violations using camera systems, therefore the ATES ordinance is invalid on its face.

20.

By enacting and enforcing the ATES ordinance, defendants have violated the rights of all of the Putative Class Plaintiffs who have paid the “civil” ATES fines or hearing costs, because Article I, §4(D) of the Constitution of the State of Louisiana of 1974 limits the taking of personal property to be forfeited at a “civil” proceeding to personal property directly involved in the sale, use, exchange, manufacture, etc., of contraband drugs. These violations of the Putative Class Plaintiffs’ civil rights were enforced by the defendants while acting under color of law, in violation of 42 U.S.C.A. §1983.

21.

The ATES ordinance violates the rights of the Putative Class Plaintiff protected by Article VI, §9(A) of the Constitution of the State of Louisiana of 1974, because the ordinance impermissibly alienates the police power of the City of New Orleans via contract with a private entity, ATS. Upon information and belief, the contract between the City and ATS provides that the collection of fines for traffic violations will be conducted by ATS. Proof of this allegation is contained not only in the contract, but also in the ordinance. For instance, ATES Section 154-1701, entitled “Enforcement procedures,” provides:

The department of public works for the city is responsible for the enforcement and administration of sections 154-1701 through 154-1704.

The department of public works may enforce and administer

¹ See <http://www.legis.state.la.us>- Regular Session, 2001, Senate Bill No. 1059: Result- Rules suspended; Regular Session, 2004, House Bill No. 1078: Result- yeas 24, nays 71; Regular Session, 2005, Senate Bill No. 168: Result- Withdrawn.

sections 154-1701 through 154-1704, or any parts thereof, through one or more contractors selected in accordance with applicable law.
[Emphasis added]

Under the provisions of its contract with the City of New Orleans, ATS is contractually obligated to interact with court and judicial personnel in an impermissible exercise of police power by developing the citation and subpoena process, controlling the photographic evidence, maintaining and controlling the photographic equipment, controlling the coordination between the defendants and their agents, and collecting and holding fines, all of which is an impermissible exercise of police power by ATS and an unconstitutional delegation of governmental authority. The effect of this delegation is to allow a private company, with a prime economic interest in enforcement (ATS's share of profit derived from the ATES ordinance is based on the amount of money paid by citizens who received citations), to control the access of information to the court, and the presentation of that information to the court. A blatant conflict of interest exists between the City of New Orleans and the profit motives of the private company ATS.

Further proof of ATS's improper fine collection is found in the Notice of Violation received by plaintiffs that provide that fines can be paid online by credit card at www.ViolationInfo.com, a website that ATS, not the City of New Orleans, maintains, "hosts" and/or controls.

Defendants, acting under color of law, have illegally authorized ATS to exercise police power over Louisiana citizens in order to convert their property and deprive their civil rights, in violation of 42 U.S.C.A. §1983, and all fines and monies paid by the class members to the defendants, including ATS, must be returned.

22.

Defendants' enactment and enforcement of the ATES ordinance violates the rights of the Putative Class Plaintiff protected by Article VI, §9(B) of the Constitution of the State of Louisiana of 1974, because the "civil" ordinances impermissibly attempts to govern civil relationships.

23.

The ATES ordinance violates Louisiana law because its provisions conflict with the uniform provisions of the Louisiana Highway Regulatory Act, LSA-R.S. §32:1 *et seq.*, including but not limited to §32:61, §32:232, §32:393, §32:398, §32:398.1, §32:398.10, and §32:414(E)(1). Defendants' enactment and enforcement of the ATES ordinance, which attempts to preempt Louisiana state law in a manner that violates the plaintiff's civil and constitutional rights, was enforced by the defendants while acting under color of law, in violation of 42 U.S.C.A. §1983.

24.

The ATES ordinance violates established Louisiana procedural due process because its provisions allow service of a "civil" complaint and citation upon the plaintiff through the U.S. mail, which violates the provisions of the Louisiana Code of Civil Procedure, Arts. §1232 and §1234, regarding citation and personal service of process in civil cases, in a manner that violates the plaintiff's civil and constitutional rights, as enforced by the defendants while acting under color of law, in violation of 42 U.S.C.A. §1983.

25.

The Federal Highway Administration's 2003 Manual on Uniform Traffic Control Devices (MUTCD) Edition was adopted by Louisiana in 2005 through the Chief Engineer for the Louisiana Department of Transportation and Development; Louisiana adopted the MUTCD with no State

supplement and no exceptions. Chapter 4D, Section 4D.10 of the MUTCD, entitled “Yellow Change and Red Clearance Intervals,” provides in part:

A yellow change interval should have a duration of approximately 3 to 6 seconds. The longer intervals should be reserved for use on approaches with higher speeds.

Upon information and belief, defendants have calibrated and/or re-calibrated the timing of traffic lights at “system locations” throughout the City of New Orleans so as to shorten the duration of the yellow caution lights from their previous settings, and/or as listed in the MUTCD, with the primary intention of causing more vehicles to be photographed violating the red lights at said “system locations,” in violation of public policy, the Constitution of the State of Louisiana, and the MUTCD as adopted by Louisiana. Defendants’ deleterious conduct herein, the primary purpose of which was to separate citizens from their property via “civil” citations, was committed under color of law, in violation of 42 U.S.C.A. §1983.

26.

The application and enforcement of the ATES ordinance violates La. C.E. Art. 505, regarding the spousal witness privilege.

27.

Every Putative Class Plaintiff who paid his or her fine directly under ATES ordinance, and every Putative Class Plaintiff who contested his ticket and lost and paid his fine plus costs, suffered direct property deprivation caused by the defendants’ enactment and enforcement of the ATES ordinance that violated plaintiff’s rights under the Constitution of the State of Louisiana of 1974, and plaintiff’s due process rights protected by Louisiana law, and a favorable decision herein for the Putative Class Plaintiffs would redress this wrong.

Likewise, every Putative Class Plaintiff who has requested a hearing or has one scheduled, or has yet to choose between payment or contest, faces the very imminent threat of property deprivation caused by the defendants' enactment and enforcement of the ATES ordinance in violation of plaintiffs' rights under the Constitution of the State of Louisiana of 1974, and plaintiffs' due process rights protected by Louisiana law, and a favorable decision herein for the Putative Class Plaintiffs would redress this wrong.

28.

ATS has illegally converted the property of the Putative Class Plaintiff and all potential plaintiffs who paid fines to ATS under this invalid ordinance.

29.

The aforementioned actions of the defendants, in concert, have caused the Putative Class Plaintiff actual property deprivation as a certain number of potential plaintiffs have paid the "civil" fines, others have risked prosecution by refusing to pay, others have gone to court to fight the fine only to be assessed administrative and/or court costs on top of the fines. All of the putative class members share the same issue of law and fact, i.e., the ATES ordinance is invalid, and their enactment and enforcement by defendants violates plaintiffs' constitutional rights and procedural due process rights as set forth above, and defendants, acting in concert, have violated these constitutional and civil rights while acting under the color of law. Defendants have also violated several Louisiana laws by enacting and enforcing the ATES ordinance. Therefore, plaintiffs are seeking all actual monetary damages they incurred and paid as a result of receiving a Notice of Violation under the ATES ordinance, whether said money is in the possession of the City of New Orleans, ATS or any other entity or agent under these defendants' control, all damages allowed

under 42 U.S.C.A. §1983, including punitive damages, the striking of the ATES ordinance as unconstitutional and/or in violation of Louisiana law, and any and all other relief available in justice and equity.

WHEREFORE, Putative Class Plaintiff, Joseph R. McMahon, III, prays that the defendants be duly cited to appear and answer this Class Action Complaint, and after all legal delays and due proceedings had, that there be judgment rendered herein in favor of the plaintiffs and against the defendants, the City of New Orleans and American Traffic Solutions, Inc., together *in solido*, in a full and true sum reasonable under the circumstances for all damages, general, special and punitive, together with legal interest thereon from the date of judicial demand, until paid, and for all costs of these proceedings and all general and equitable relief required or necessary in the premises.

Respectfully submitted,



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