

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, et al

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

Equity No. 49273

**PLAINTIFFS' BRIEF IN REPLY TO  
CITY'S RESISTANCE TO PLAINTIFF'S  
MOTION FOR HEARING ON  
CERTIFICATION OF CLASS ACTION**

COMES NOW the Plaintiff, Lisa Kragnes, on behalf of herself and all others similarly situated, and by way of Reply to the City's brief in support of the City's resistance to Plaintiff's Motion for Hearing on Certification of a Class Action asserts that in light of the filing of the mutual summary judgment motions by the Plaintiff and Defendant on the issue of liability, a hearing on class certification is ripe. Furthermore, a class-wide recovery, in the event that the Court determines that the City's collection of the "franchise fees" which is the subject of this suit must be afforded in the form of a refund from the City of any and all monies illegally collected.

The issue of class certification at this point appears somewhat limited. Related thereto, the Defendant asserts only two issues in resistance. First, the Defendant asserts the hearing is held too late. Second, the Defendant asserts that certification is futile. These assertions are in error and do not justify a denial of the class certification.

**I. CLASS CERTIFICATION AT THIS JUNCTURE IS TIMELY.**

The Defendant asserts that the hearing on certification at this time is untimely. In analyzing this assertion by the Defendant, it is important to review the proceeding and the positions taken by the Defendant throughout this case. The Petition was filed in this matter in July 2004 and set forth why this case should be certified as a class. The Defendant filed a

motion to dismiss claiming that this Court had no jurisdiction to determine the issues presented in Plaintiff's Petition on various grounds. The Court ruled on Defendant's motion to dismiss, indicating that until additional evidence was presented the Court could not sustain Defendant's motion to dismiss. As a result of the issue of jurisdiction and other issues being left open, the Plaintiff proceeded to obtain the discovery necessary that would demonstrate that proper jurisdiction existed in this Court and to demonstrate the invalidity of the other affirmative defenses asserted by the Defendant as well as the illegality of the fee and the appropriateness of certification. Again, the Defendant resisted the Plaintiff's efforts to conduct discovery and a motion to compel was filed as result thereof. The Court sustained that motion to compel. Depositions were conducted in October, although both parties have agreed that discovery procedures may continue to be properly conducted by the parties, even to this date.

On the deadline for filing Motions for Summary Judgment, the Plaintiff filed a motion for summary judgment on the issue of the Court's jurisdiction to hear and determine this matter in her First Motion for Partial Summary Judgment and accompanying brief. Simultaneously the Plaintiff filed the present Motion for Hearing on Class Certification. Actually, it was not until the Defendant conceded jurisdiction in the Court by failing to resist the Plaintiff's First Motion for Partial Summary Judgment, that it became clear that the issue of this Court's jurisdiction to decide this matter was no longer at issue in this case and the practicability of class certification became ripe for Court consideration.

The Defendant correctly cites IRCP 1.262(1) which provides:

"Unless deferred by the Court, as soon as practicable after the commencing of a class action, the Court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action."

The Tennessee Courts have analyzed a similar issue based on similar rules of civil procedure governing class actions in that state. In the case of *Simmons v. State Farm General Insurance Company, et al.*, W2003-02643-COA-R3-CV, November 24, 2004 (Court of Appeals of Tennessee), the Court analyzed the promptness of a certification hearing when the Court failed to hold a certification hearing until such time as summary judgment motions were ruled upon by the Court. The Court in that case entered summary judgment in favor of the Defendant, State Farm General Insurance Company, and thereby mooted the necessity of certification. Plaintiffs appealed claiming the certification hearing, pursuant to the Tennessee rules of civil procedure, must be held as soon as practicable after the commencement of a class action. In that case, the Court found:

"The Plaintiffs contend that, by granting State Farm summary judgment against the named, individual plaintiffs and, thus "mooting" the class action, the trial court violated the spirit of Rule 23.03 of the Tennessee Rules of Civil Procedure. Rule 23.03 provides, in relevant part, "as soon as practicable after the commencement of an action brought as a class action.....the Court shall determine by order whether the action is to be so maintained.....the Plaintiff's cite Rule 23.03 for the proposition that a class certification determination must always be considered prior to the merits of adjudication or hearing on a dispositive motion. The Court in analyzing the argument determined "at an early practicable time" included in the rules was indefinite language prescribing the timing of certification decisions which was purposely imprecise because it is intended to provide the courts latitude in making class certification decisions. Citing *5 James William Moore et al.*, Moore's Federal Practice § 23.81(1)(3<sup>rd</sup> Edition 2004). *Id.*

That Court, in analyzing federal court rulings on similar issues determined that federal courts allow dispositive rulings prior to a class certification determination, citing *Miami University Wrestling Club v. Miami University*, 302 F3rd 608, 616 (6<sup>th</sup> Circuit 2002) (We have consistently held that the District Court is not required to rule on a motion for class certification before ruling on the merits of the case); *Curtain v. United Airlines Inc.*, 275 F3rd 88, 92 (D.C. Circuit 2001) (Holding that where the merits of a party's claim can be disposed of by summary judgment, the timing of the disposition of motions for class certification and summary judgment

is within the discretion of the Court); *Accord Sweitzer v. TransUnion Corp.*, 136 F3rd 233, 239 (2<sup>nd</sup> Circuit 1998); *Wade v. Kirkland*, 119 F3rd 667, 670 (9<sup>th</sup> Circuit 1997); *Floyd v. Bowen*, 833 F2nd 529, 534-35 (5<sup>th</sup> Circuit 1987).

IRCP 1.262(1), similar to the rules in Tennessee, specifies an indefinite time for court action on class action certification utilizing similar language as the language set forth in the Tennessee rules as interpreted by the Tennessee Court of Appeals. The language is purposefully imprecise because it is intended to provide the court latitude in making class certification determinations.

In the case at bar, the Defendant immediately filed a motion to dismiss claiming the Plaintiff lacked standing, and that the action constituted a collateral attack on an agency decision and suggesting that the Iowa Utilities Board had jurisdiction to determine this matter. While it has always been the position of the Plaintiff that these positions of the Defendant were unsupportable, it was not until discovery was concluded on the issues and Defendant opted to concede the jurisdiction of the Court to determine this matter by not resisting Plaintiff's first motion for partial summary judgment on the issue of the Court's jurisdiction, that it became clear that jurisdiction would lie in this Court for ultimate determination. Additionally, like the Tennessee case, summary judgments have been filed by both parties in this case which may be dispositive of the issue whether or not the case proceeds. In the event the Court rules in favor of the Defendant, class certification will be moot unless the matter is reversed on appeal. In the event the Court rules in favor of the Plaintiff, the issue of certification will be ripe for determination.

The Defendant, seems to resort to personal attacks and suggests that the Plaintiff's request for the certification hearing could be interpreted as an instance of "sandbagging". The

Defendant, however, has always known that this matter was filed as a class action by Lisa Kragnes on behalf of herself and others similarly situated. That was initially pled in the Plaintiff's petition (and even referred to in Defendant's motion to dismiss as an improper motive for pursuing a district court action) and referenced in the Court's ruling on Motion to Dismiss, p. 1. Also, the Defendant took the deposition of the Plaintiff and yet, at no time then or after, did the Defendant ask Plaintiff or Plaintiff's counsel as to class action certification, and also never informed the Plaintiff that its intentions concerning Iowa Utility Board jurisdiction, the Plaintiff's standing or collateral attack were, in fact, being withdrawn. Additionally, the Defendant itself never asked for a certification hearing seeking the Court to deny certification of this matter as a class action.<sup>1</sup>

Irrespective, certification is clearly appropriate based on the 16 criteria the Court considers in certifying the class, and the Defendant, in its brief, makes no attempt to refute those criteria as having been established. It is inconceivable that the City would pose issues concerning the jurisdiction of this Court to ultimately determine and rule on Plaintiff's petition, not ask the Court for an immediate hearing certifying the class and now critically assert that the Court's failure to hold a hearing somehow defeats jurisdiction. Certification is appropriate, depending on the Court's ruling on summary judgment. It is the Plaintiff's position that summary judgment in favor of Plaintiff is appropriate, and frankly, based on the lack of cogent resistance by the Defendant, it is unclear as to whether or not the even the Defendant truly believes at this point that it can legally collect the fees in question.

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<sup>1</sup> The Defendant also makes mention of the closeness of the trial date. As the Court is aware, the originally scheduled trial date, per the understanding parties and per court orders, is the date for consideration of summary judgment motions. A trial will only be set at a latter date depending upon determination of those summary judgment motions.

**II. CLASS ACTION IS NOT FUTILE IN THIS CASE AND THIS COURT CAN ORDER THE RELIEF REQUESTED.**

Defendant appears to assert, again, that MidAmerican Energy is an indispensable party and as a result Plaintiff cannot recover from the City for the franchise fees/taxes illegally imposed by the Defendant upon the customers of MidAmerican Energy within the city limits of the City of Des Moines. This argument is entirely without merit.

MidAmerican Energy may be the vehicle that the City of Des Moines utilizes in collecting the fee/tax. However, it is the City of Des Moines who has imposed, been paid and received the illegally collected fees/taxes. It can pay the appropriate judgment without MidAmerican being involved and refund that money collected through that collection agent, MidAmerican.

Furthermore, when it comes to the calculation of damages and the distribution of the award, the Plaintiff does have subpoena power and other methods of identifying the customers who paid the fee through MidAmerican Energy who even the Defendant admits possesses the identity of the customers. (See Defendant's Brief, page 7). As this Court correctly held in overruling the Defendant's Motion to Dismiss, page 7:

"A party is indispensable to pending litigation if its interest is not severable, and the party's absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding the party's absence the party's interest would necessarily be inequitably affected by a judgment rendered between those before the court. Iowa R Civ. P. 1.234(2),

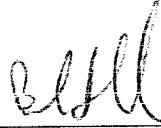
It is claimed that MidAmerican is required to be apart of this litigation because only it has the information necessary to identify the remaining members of the purported class, as well as to calculate the fees actually collected. The plaintiff accurately points out that such information is available through traditional discovery methods directed to non-parties, and does not require the joinder of MidAmerican."

The Defendant's position has not changed and remains without merit. The Defendant ignores the subpoena power and other compulsion powers the commencement of litigation brings. The position of Des Moines should again be rejected by this Court.

### CONCLUSION

The Plaintiff initially made a request for class certification in the petition filed with the Court in July, 2004. Various allegations by the City of Des Moines manifest in its initial Motion to Dismiss and assertion of certain affirmative defenses in its answer to Plaintiff's petition suggested an issue of outstanding, collateral attack of an agency decision and lack of jurisdiction by the Court. It was not until the discovery was completed and it was clear that those affirmative defenses were without legal merit (as now evidenced by the fact the Defendant has abandoned them and now decided not to resist the Plaintiff's First Motion for Partial Summary Judgment) that those issues appeared to no longer stand in the way of class certification. Ultimately, dispositive motions are currently pending before the Court and should the Court rule in favor of the Plaintiff, the refunds should ultimately be ordered of any amounts illegally collected by the City of Des Moines, the Plaintiff's case is manageable in the form of a class action and virtually all of the criteria considered by the Court pursuant to IRCP 1.262 are met. In fact, this case could not be better suited for class adjudication. Plaintiff's motion for hearing and ultimate certification of this matter as a class should be granted.

RESPECTFULLY SUBMITTED BY:



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ORIGINAL FILED.

Copies of the foregoing have  
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By:  \_\_\_\_\_