

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al. Plaintiffs, vs. CITY OF DES MOINES, IOWA, Defendant.</p>	<p>Equity No. 49273 PLAINTIFFS' MOTION UNDER IOWA RULE OF CIVIL PROCEDURE 1.276 AND TO EXPAND FINDINGS AND RECONSIDER RULING ON CLASS CERTIFICATION</p>
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Plaintiff Lisa Kragnes hereby submits the following in support of this Motion Under Iowa Rule of Civil Procedure 1.276 and to Expand Findings and Reconsider Ruling on Class Certification.

1. The Plaintiff filed this action on July 27, 2004 seeking to recover and enjoin illegal franchise fees collected by the Defendant City of Des Moines.
2. The Plaintiff, in her Petition, sought certification of this motion as a class action to include those potential plaintiffs to whom the City of Des Moines has charged this fee over the period indicated in the Petition.
3. The Defendant resisted the motion on only three bases: 1) the request was untimely, 2) there has been no opportunity to gather evidence on the issues raised by the request for certification, and 3) certification is unnecessary, in that the defendant cannot afford the plaintiff and the contemplated class the monetary relief requested.
4. On January 5, 2006, the Court granted the Plaintiff summary judgment on the merits of this case, explicitly reserving ruling on the certification of a class action lawsuit.

5. The Court ruled on January 12, 2006 to deny certification of the class for the moment based on the Court's concerns regarding Iowa Rule of Civil Procedure 1.263(2)(c), concerns that were not raised by the city in its objections to class certification. Namely, that the representative party must have or can acquire adequate financial resources, considering Rule 1.276, to ensure that the interests of the class will not be harmed.

6. The Court specifically found that it did not have sufficient record for the Court to determine that the Plaintiff would be able to adequately represent the class financially as required by Rule 1.263(2)(c).

7. In response to this concern, and in light of subsequent rule and case law changes since the original fee agreement between Plaintiff and counsel was entered (as will be explained more fully below), Plaintiff and her counsel have entered into a revised agreement that is being offered to the Court as required by Rule 1.276(1).

8. Plaintiff is also now asking the Court pursuant to Iowa Rule of Civil Procedure 1.276(2) to determine that the costs and litigation expenses of the action cannot fairly and reasonably be defrayed by the Plaintiff, and to accordingly order that counsel for Plaintiff may advance such costs, subject to reimbursement from any recovery obtained for the class. As the Court noted in its ruling, and as the evidence developed in the case (including Defendant's deposition of Plaintiff) has shown, Plaintiff lives in a modest home with a mortgage, and earns a comfortable yet modest wage in her employment with Methodist Hospital. It is expected that remaining costs associated with class certification prosecution may range between \$100,000 and \$150,000.

9. Iowa Rule of Civil Procedure 1.276(2) provides that “Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorney or others, or both subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.”

10. The Iowa Supreme Court, in its 2005 ruling in *Comes v. Microsoft Corporation*, 696 N.W.2d 318 (Iowa 2005) considered the Court’s concerns (as cited from *Stone v. Pirelli Armstrong Corp.*, 497 N.W.2d 843, 846 (Iowa 1993)) about Plaintiff’s attorneys acquiring a financial interest in this litigation and resolved the matter in favor of allowing advancement of courts costs and expenses of litigation.

11. This updated approach is consistent with newly amended Iowa Rule of Professional Conduct 32:1.8(e)(1), which states, “a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.”

12. As indicated, the Iowa Supreme Court in *Comes v. Microsoft Corporation*, 696 N.W.2d 318 (Iowa 2005) considered a fee agreement in which the plaintiffs’ attorneys requested that the court issue an order under Rule 1.276 approving the fee arrangement allowing the plaintiffs’ attorneys to advance all costs. *Comes* at 326. In *Comes*, the Iowa Supreme Court specifically distinguished the *Stone* case the Court cited because the earlier *Stone* decision did not consider Iowa Rule of Civil Procedure 1.276(2)

and the recently enacted Rule of Professional Conduct 32.1.8(e)(1). The Iowa Supreme Court in *Comes* went on to hold, “In view of Iowa Rule of Civil Procedure 1.276, and its provision for advancement of costs in a class-certification case, we conclude that the plaintiffs have sufficiently established their ability to provide financial resources to be certified to represent the class.” *Comes* at 327.

13. With this modified fee agreement and request for further findings and order presented to the Court today, the present case is materially indistinguishable from *Comes* on this issue.

14. To further allay the Court’s concerns regarding attorneys gaining a financial interest in the litigation, it is worthy of note that the *Stone* court stated this was especially a concern “when it comes to deciding whether to settle the case.” 497 N.W.2d at 848-849. Given the city’s position and the nature of this litigation, settlement, as opposed to final resolution by the Iowa Supreme Court, is a virtual impossibility. Additionally, class-action rules provide for Court review and approval of any settlement proposal as well as class member participation through notice. See Iowa Rule of Civil Procedure 1.271(2) (2006).

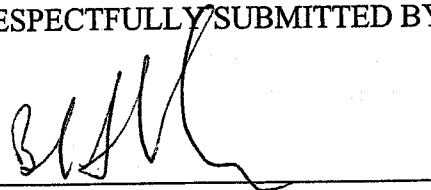
15. Furthermore, Rule 1.273(3) states, “Expenses of notice advanced under rule 1.266 are taxable as costs in favor of the prevailing party.” Unless the Court’s decision on the merits of this case are overturned on appeal, the Defendant City of Des Moines will be responsible at the conclusion of the class action for reimbursing any costs of the Plaintiff and her attorneys incurred in administering the class action. The Court has already granted summary judgment allowing injunctive relief in this matter, making

Plaintiff the prevailing party for purposes of Rule 1.273(3). The Court already determined the Defendant's actions are illegal and enjoined such action.

16. Finally, the present procedural posture of this case further addresses any potential concerns. The Plaintiff's major costs in obtaining a judgment in this case, ordinarily the primary concern with respect to costs, have already been incurred at this point. Where a class certification occurs prior to a determination on the merits, the Court should rightfully give greater weight to considerations regarding the costs associated with prosecuting the case as a class action. In this case, as most of the expenses and costs necessary to obtain judgment have already been incurred, this consideration should be afforded relatively less weight.

ACCORDINGLY, Plaintiff Lisa Kragnes requests the Court expand its findings and reconsider its ruling in such a manner so as to provide certification of the class action. Class action resolution, as observed by the Court in its prior ruling, would otherwise be the most expedient, fair, and judicious way to resolve these issues. As the Iowa Supreme Court held in *Comes*, "Our class-action rules are remedial in nature and should be liberally construed to favor the maintenance of class actions." 696 N.W.2d at 320.

RESPECTFULLY SUBMITTED BY:



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Original filed.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Sept. 13 2006

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Certified Mail Other:

Signature Bill Godwin